No. 83-5701

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

JAMES ADAMS,
Petitioner,

vs.

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Sixth and Fourteenth Amendments permit the denial of a claim of ineffective assistance of counsel in a capital sentencing trial -- on the basis of a presumption that counsel provided effective assistance -- where the record shows that counsel decided: (a) to present no evidence of mitigating circumstances, despite the available but uninvestigated evidence of very substantial mitigating circumstances; (b) to inform the jury and the court in the sentencing trial that "[w]e [the defense] have no evidence"; and (c) to present a closing argument which conceded the persuasiveness of the reasons for imposing death, provided no reasons for imposing life instead of death, and apologetically asked the sentencer to "consider" imposing life despite there being no reason he could think of for doing so.

2. Whether the sentencing court's application of non-premeditated felony murder as an aggravating circumstance justifying the imposition of the death penalty conflicts with the Court's recent pronouncement in Zant v. Stephens, ___U.S.___, 103 S.Ct. 2733, 2747 (1983), prohibiting capital sentencing tribunals from treating as aggravating "conduct that actually should militate in favor of a lesser penalty."

3. Whether the Florida courts' procedural default rule, which is haphazardly applied in capital cases, can serve as an "independent and adequate state procedural ground" under Wainwright v. Sykes, 433 U.S. 72 (1977) and thus bar federal habeas corpus review of capital sentencing issues.

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UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, JAMES ADAMS, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit filed July 18, 1983. Rehearing was denied on September 12, 1983.

CITATIONS TO OPINIONS BELOW

The opinion of the court of appeals is reported at 709 F.2d 1443 (11th Cir. 1983), and is set out at pages 1a-8a of the Appendix.[1] The order denying rehearing is set out at App. 9a.

JURISDICTION

The judgment and opinion of the court of appeals were filed on July 18, 1983, and petitioner's timely petition for rehearing was denied on September 12, 1983. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the sixth amendment to the Constitution which provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ... and to have the assistance of counsel for his defense;

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[1] Citations to the Appendix accompanying this petition are designated App. ___.

the eighth amendment to the Constitution which provides in relevant part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;

and the fourteenth amendment to the Constitution which provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law ....

It also involves Section 921.141, Florida Statutes (1973), which is set out at App. 10a-11a.

STATEMENT OF THE CASE

A. Course of Prior Proceedings

Petitioner was indicted for first degree murder in St. Lucie County, Florida on December 11, 1973, solely upon a theory of felony murder and not upon a theory of premeditated intent. (R. 6-7)[2] He was thereafter convicted of first degree felony murder on March 15, 1974, and was immediately thereafter sentenced to death.

Petitioner appealed his conviction and sentence to the Supreme Court of Florida, and both were affirmed. Adams v. State, 341 So.2d 765 (Fla. 1976) (Boyd and Hatchett, J.J., dissenting), cert. denied, 434 U.S. 878 (1977). [This opinion is set out at App. 12a-17a.]

Thereafter, pursuant to this Court's decision in Gardner v. Florida, 430 U.S. 349 (1977), petitioner filed an application for relief in the Supreme Court of Florida. The application was

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2 References to the record in the courts below will be abbreviated as follows:

"T," the transcript of the trial in the Circuit Court of the Nineteenth Judicial Circuit of Florida, March 12-15, 1974;

"R," the record on direct appeal to the Supreme Court of Florida from the judgment of conviction of first-degree murder and sentence of death;

"PCT," the transcription of the evidentiary hearing on petitioner's motion for post-conviction relief in the state trial court, January 25, 1980.

denied. Adams v. State, 355 So.2d 1205 (Fla. 1978), cert. denied, 439 U.S. 947 (1978). [This opinion is set out at App. 18a-19a.]

Petitioner then commenced and prosecuted state post-conviction and federal habeas corpus proceedings. His motion for post-conviction relief pursuant to Fla.R.Crim.P. 3.850 was denied by the Circuit Court in St. Lucie County, and that order was affirmed by the Supreme Court of Florida. Adams v. State, 380 So.2d 423 (Fla. 1980) [This opinion is set out at App. 20a-22a.] He then filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Florida. Following the denial of this petition in an unreported order and opinion [which is set out at App. 23a-32a], petitioner appealed to the United States Court of Appeals for the Eleventh Circuit. On July 18, 1983, a panel of the Eleventh Circuit affirmed the District Court's denial of habeas corpus relief. Adams v. Wainwright, 709 F.2d 1443 (11th Cir. 1983) [App. 1a-8a].

On August 8, 1983, a timely petition for rehearing and suggestion for rehearing en banc was filed in the Eleventh Circuit concerning the panel opinion. Rehearing was denied by order, dated September 12, 1983. (App. 9a)

B. Statement of Material Facts

The evidence at trial showed that on the morning of November 12, 1973, Edgar Brown was found injured in his home (T. 441). Apparently the perpetrator had entered the residence unarmed while no one was in the house (T. 267, 324-325, 442-446). Sometime later the deceased returned home and discovered the perpetrator (T. 241, 324-325). There was a struggle, during which the deceased received injuries from a fireplace poker kept in the house. He died the next day.

The State presented evidence that a car like that owned by Mr. Adams was seen at the deceased's home the morning the crime occurred (T. 325, 358). Mr. Adams' car was located later that day at a paint and body shop where he had left directions that it be repainted (T. 524), a course he had been considering months earlier (T. 865, 930). Mr. Adams established that his vehicle had been driven the morning of the offense at about 10:00 or

10:15 a.m., one-half hour before the assault on the deceased (T. 352), by his friend, Vivian Nickerson, and another man, William Crowley (T. 861, 862, 938). The trunk of the car was defective and could be opened without a key (T. 881).

The only State witness who saw a man leave the Brown house did not identify Mr. Adams even though the witness conversed with the person he saw. In fact, he said that person was blacker than Mr. Adams (T. 366). The witness had heard a woman's voice before seeing the man (T. 365).

Both the State and the defense presented evidence showing that on November 12, 1973, Mr. Adams was in the process of moving back to his wife's house from a friend's house where he had been staying during a short separation (T. 634). Mr. Adams testified that he transferred his belongings from the friend's house to his car and then to his wife's car (T. 865). In his wife's car, which was searched after Mr. Adams was arrested on the instant charge, were found several items identified as belonging to Edgar Brown or members of his family (T. 648, 808, 810, 812, 816, 822). Mr. Adams had approximately $200 on his person at the time of his arrest on November 12, 1973 (T. 586), although State witnesses testified that the deceased always carried between $700 and $1000 cash, which was missing when he was found (T. 815).

Throughout pre-trial and trial proceedings, Mr. Adams consistently denied any involvement in the homicide of Edgar Brown. During the guilt-innocence trial, he testified in great detail concerning his activities during the time of the homicide, none of which put him anywhere near the Brown residence (T. 837-927). Prior to the imposition of his death sentence, after the trial judge asked Mr. Adams if he had anything to say, Mr. Adams responded, "All I would like to say one thing, Mr. Brown's murderer is still out there. I didn't do it." (T. 1192)

At the close of the evidence in the guilt-innocence trial, prior to closing arguments, a charge conference was held. During this conference, both the trial judge and the prosecutor agreed that there was "no premeditation involved in this thing." (T. 1004) The prosecutor further declared that this was a case

"where premeditated intent or design is not involved." (T. 1006) Accordingly, the trial judge determined that he would instruct the jury only on felony murder. (T. 1015)

Thereafter, the prosecutor argued to the jury that

> the issue in this case is one thing. It is for you to determine whether or not James Adams, while he was engaged in the perpetration or the attempt to perpetrate a robbery did kill Edgar Brown here in St. Lucie County on November 12, 1973. I submit to you that that is the sole issue for you to decide.

(T. 1050) Consistent with the determination in the charge conference and with the prosecutor's argument, the Court then instructed and subsequently reinstructed the jury that it could return a verdict of guilty of first degree murder only upon a finding that petitioner had killed the deceased during a robbery or attempted robbery "even though there is no premeditated design or intent to kill." (T. 1126, 1145)

At the penalty trial, the State adduced evidence that Mr. Adams had been convicted of rape in 1963 in Tennessee, and was sentenced to 99 years in prison for that charge. Also placed in evidence was testimony that Mr. Adams escaped from prison in 1972 (T. 1163-1174). The sole witness to these facts was Sheriff Cribbs of Dyer County, Tennessee, who was permitted to identify Mr. Adams using pictures and fingerprints taken at a Tennessee police station in 1956.

On behalf of Mr. Adams at the penalty trial, defense counsel said, "We have no evidence." (T. 1175) The only other presentation by the defense during the penalty trial consisted entirely of the following one minute closing argument:

> May it please the Court. Ladies and gentlemen, you have heard all the evidence and you have found James Adams to be guilty of first degree murder.
>
> I understand how Mrs. Brown felt during her testimony, recalling the testimony in which she saw her husband lying there in the condition he was. I understand Mr. Brown's reputation in the community. I think you understand the situation. You have heard all the evidence.
>
> The only thing we can ask you here today is to consider whether or not the death penalty is appropriate in this case. Now, the Florida Legislature has declared in its infinite wisdom that the death penalty is a proper judgment in some cases, and the State is allowed to introduce evidence to show why it believes that here today is a case where you could

> appropriately advise the Court that this man should be put to death and yet I find it necessary to ask for you to consider that you save his life in spite of all this and let this man live, for no other reason than that he is a man. Thank you.

(T. 1179-1180)[3]

At the hearing on Mr. Adams' motion to vacate, two witnesses testified. The first was Bruce Wilkinson, who had served as co-counsel in a support capacity during Mr. Adams' trial and who had represented Mr. Adams in subsequent clemency proceedings. Mr. Wilkinson testified that the trial judge told Mr. Adams' trial attorney during an unreported conference in chambers that he was limited in the presentation of mitigating circumstances to those enumerated in the statute and that nothing else would be allowed (PCT. 14). Trial counsel had confirmed Mr. Wilkinson's recollection in a conversation with the latter (PCT. 14). Mr. Wilkinson was thoroughly familiar with the trial file, which detailed substantial investigation as to the guilt phase of Mr. Adams' trial (PCT. 14-15, 22-24). But there was no specific delineation of any matter which was considered for the penalty phase, even though Mr. Wilkinson readily discovered, in his own investigation for the clemency proceedings, evidence which was available at the time of trial, which could have been presented in mitigation of sentence, but which, inexplicably, was not. This evidence included the circumstances of Mr. Adams' background: that he was one of eleven children of sharecroppers in rural Tennessee, who was required to begin working at about 10 years of age to help support the family. He received little or no education, since he was allowed to attend school only when it rained, and was consequently illiterate. When Mr. Adams was 16, his father died and he became the head of the household, working two or three jobs simultaneously to support his mother, and the other children who remained at home. He continued working until he was charged with rape when he was 28 (PCT. 30-31). Also available at the time of trial was local information that Mr.

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[3] Not surprisingly, the jury thereafter recommended (T. 1188), and the judge imposed (T. 1193), a death sentence. Among the findings relied upon by the judge in imposing death was the commission of the murder in the course of the commission of a robbery (R. 85).

Adams was active in the church and counselled children (PCT. 25, 31), and evidence that Mr. Adams had a good employment record while in Fort Pierce (PCT. 23).

Moreover, although Mr. Adams had testified at trial in response to the State's cross-examination that he had "five or more "convictions (T. 926), Mr. Wilkinson readily discovered that only the 1962 rape conviction was even superficially legal (PCT. 15, 16). Two other misdemeanor convictions--all that there was record of--had been uncounselled and there had not been an offer of counsel. And one of those convictions was for the 1956 larceny of a pig Mr. Adams and his brother had taken for food (PCT. 16, 18, 26). [The trial judge had relied upon Mr. Adams' erroneous testimony in justifying the sentence of death (R. 84).]

In addition Mr. Wilkinson testified that he discovered that Mr. Adams' rape trial was before a jury which may well have been the product of racially selective procedures. In any event, all the jurors were white, and the courtroom was racially segregated; Mr. Adams' family had to sit in the balcony. Mr. Adams himself was shackled throughout the trial, although there was no indication he acted in a way which would have justified such a prejudicial treatment, which was apparently standard procedure (PCT. 20-21).

Finally, Mr. Wilkinson determined that Mr. Adams' prison record in Tennessee was excellent: indeed, he had been on trustee status assigned to a women's correctional institution. There was no violence involved in his escape, which occurred when he drove away in a State vehicle to which he had free access because of his status. (PCT. 27)

Also testifying at the hearing was Richard Lubin, a criminal defense attorney with substantial experience in capital trials, who opined that Mr. Adams' defense counsel at trial did not render effective assistance because of his failure to adequately investigate and prepare mitigation for the penalty phase, coupled with his totally ineffectual closing argument and his failure to challenge the rape conviction, explain Mr. Adams' criminal record, or object to certain inflammatory remarks made by the prosecutor during his closing summation (PCT. 54, 62-63, 70-71).

With no further hearing having been held in federal court, it is upon the foregoing facts that the death sentence and death sentencing procedure for James Adams have been approved.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED IN THE COURTS BELOW

1. Mr. Adams first raised his claim that he had been denied effective assistance of counsel in his sentencing trial in state post-conviction proceedings pursuant to Fla.R.Crim.P. 3.850. On the appeal to the Florida Supreme Court in these proceedings, the Court rejected Mr. Adams' claim that counsel was ineffective for his failure to investigate and present available mitigating evidence on the following basis: "it is our view that the mitigating and ameliorating evidence suggested in appellant's allegations would not have affected the sentence, and was, in fact, already negated to a large extent by the appellant's own testimony during the guilt-innocence portion of the trial." (App. 22a) Mr. Adams raised the same claim in his federal habeas petition [¶12(d) of the petition], and the district court rejected the claim for essentially the same reason as the Florida Supreme Court. (App. 30a) Finally, Mr. Adams presented this claim as one of the issues on his appeal to the Eleventh Circuit. The Eleventh Circuit's disposition of the claim is discussed at length in the "Reasons..." section of the petition.

2. Mr. Adams first raised on direct appeal to the Florida Supreme Court his claim that the felony murder basis of his conviction entitled him to have the non-intentional-homicide finding associated with that conviction considered as mitigating against death. (Appellant's Second Supplemental Brief, Case No. 45,450, at 8-13)[4] The Florida Supreme Court nonetheless approved, without discussion, the consideration of the felony murder aspect of the homicide as an aggravating circumstance. (App. 16a) Mr. Adams raised the same claim in his federal habeas corpus petition [¶12(a) of the petition], and the district court rejected the claim:

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[4] In the state courts and the federal courts--until this Court's decision in Zant v. Stephens, ___U.S.___, 103 S. Ct. 2733 (1983) -- Mr. Adams raised this issue primarily as a death-is-disproportionate issue because of the non-intentional aspect of the murder. Only after Zant did he include expressly the claim that the felony murder should have been considered a mitigating circumstance. However, the argument--that "pure" felony murder is a mitigating circumstance instead of an aggravating circumstance -- was contained within all of his "death-is-disproportionate" presentations of the issue. Thus, he submits that the issue as framed is properly raised herein.

> Petitioner's contention that the death penalty is being imposed as punishment for a non-deliberate killing in this case is erroneous. The deliberateness of the act is presumed from the evidence at petitioner's trial that the beating that resulted in the victim's death occurred during the perpetration of a robbery. The felony murder rule simply obviated the necessity of proving the defendant's state of mind.

(App. 24a) Finally, Mr. Adams presented this claim as one of the issues on his appeal to the Eleventh Circuit. The Eleventh Circuit held that death is not disproportionate for the actual killer in a felony murder homicide, without regard to whether the killer actually intended to kill. (App. 4a-5a) On rehearing, Mr. Adams raised the Zant aspect of this issue--that even if death is not disproportionate for a "pure" felony murder (one for which the conviction is solely for felony murder, not for both premeditated and felony murder), the lack of actual intent to kill must at least be considered as mitigating and not aggravating -- and rehearing was denied without opinion. (App. 9a)

3. Mr. Adams first presented his claim that the trial judge improperly limited the consideration of mitigating factors to those enumerated in the death penalty statute in his state post-conviction proceedings. On the appeal to the Florida Supreme Court in these proceedings, the court focused only on that aspect of this claim regarding the trial judge's exclusion of potential evidence of nonstatutory mitigating factors. (App. 21a) In his federal habeas corpus petition, Mr. Adams raised both aspects of this claim again--arguing that his Eighth and Fourteenth Amendment rights were violated by both the exclusion of potential evidence of nonstatutory mitigating circumstances and the restriction of the jury's consideration of mitigating factors, to those enumerated in the statute, in the penalty trial charge to the jury [¶12(b)(3) of the petition]. Although the state argued that review of the jury instruction aspect of this issue was barred under Wainwright v. Sykes, 433 U.S. 72 (1977)--by virtue of no objection having been made to the instructions at trial--the district court reached the merits: "The judge tracked the language of the statute in charging the jury, and did not instruct the jury not to consider other nonstatutory mitigating

factors." (App. 26a) Mr. Adams raised this issue on his appeal to the Eleventh Circuit, but the court refused to review the merits of the issue because of the procedural default in raising the issue. (App. 6a-7a) Prior to the publication of the Eleventh Circuit's opinion, however, Mr. Adams had sought the court's leave to file a supplemental brief arguing that Florida's procedural default rule was so inconsistently applied to the state court's review of capital sentencing issues that it could not bar federal review under Sykes. Although the motion was disallowed, the court did permit this brief to be considered in connection with Mr. Adams' petition for rehearing. Rehearing, however, was denied without opinion. (App. 9a)

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO DETERMINE THE PROPER ROLE OF THE PRESUMPTION OF ATTORNEY COMPETENCE IN THE ANALYSIS OF A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL IN A CAPITAL SENTENCING TRIAL, BECAUSE THAT PRESUMPTION IS BEING UTILIZED TO DENY CLAIMS OF INEFFECTIVE ASSISTANCE--EVEN THOUGH DEFENSE COUNSEL PRESENTED NO MITIGATING EVIDENCE (DESPITE THE AVAILABILITY OF SUBSTANTIAL MITIGATING EVIDENCE) AND ARGUED IN EFFECT THAT DEATH WAS APPROPRIATE--SOLELY FOR THE REASON THAT FORMER DEFENSE COUNSEL HAS NOT (OR WILL NOT) ADMIT A FAILURE TO INVESTIGATE OR OTHER DEFAULT IN HIS DUTY OF REPRESENTATION.

The Eleventh Circuit's approval of James Adams' capital sentencing trial and resulting death sentence--over his claim that counsel provided ineffective assistance in that trial--is a grave miscarriage of justice. The sole reason for this injustice, as will be demonstrated in the succeeding paragraphs, is the uncontrolled and arbitrary operation of the principle that attorneys are presumed to be competent. The Court should grant certiorari to determine (a) whether this presumption should operate at all once "a defendant who claims his lawyer was ineffective [has] come forward with specific complaints about what the lawyer failed to do, and with specific arguments about how this failure hurt his case," Stanley v. Zant, 697 F.2d 955, 974 (11th Cir. 1983) (Arnold, J., dissenting), and (b) if it is to operate beyond this point, to what specific issues it applies and how, in relation to those issues, it can be rebutted.

To enable the Court to appreciate fully the gravity of the injustice done to Mr. Adams--and consequently the extraordinary importance of granting certiorari to rectify this injustice to him and to prevent its systematic recurrence in other cases--a review of Mr. Adams' sentencing trial is necessary. Through the incorporation of the evidence adduced in the guilt-innocence trial (T. 1175) and the presentation of additional evidence in the sentencing trial (T. 1163-1174), the state presented sufficient evidence to persuade the trial judge to find

> that aggravating circumstances, far outweighing any mitigating circumstances, are as follows:
>
> 1. The capital felony of murder in the first degree was committed by the defendant, James Adams, while he was under sentence of imprisonment for 99 years by the Court of General Sessions, Dyer County, Tennessee after a conviction on the charge of rape.

2. The defendant was previously convicted of a capital felony, same being the charge of rape above referred to and being a felony involving also the use or threat of violence to the person.

3. The capital felony of murder in the first degree was committed while the defendant was engaged in the commission of or in an attempt to commit the crime of robbery.

4. The capital felony of murder in the first degree was committed for the purpose of avoiding or preventing a lawful arrest.

5. The capital felony of murder in the first degree was committed for pecuniary gain.

6. The capital crime of murder in the first degree was especially heinous, atrocious, and cruel.

By his own admission the defendant was previously convicted of crimes on at least five occasions and the further undisputed evidence shows the defendant has a record involving crimes of violence; that he is an escapee of the State Prison System of the State of Tennessee and that the body of the victim was mutilated, mangled and disfigured unnecessarily.

(R. 84-85)[5] To counter the evidence of these aggravating factors, Mr. Adams' counsel declared, before the jury and the judge in open court, "We have no evidence." (T. 1175) While counsel might have qualified this declaration by saying, "we have no new evidence"--followed by an explanation that the evidence of guilt left enough room for doubt about Mr. Adams' actual guilt that death should not be imposed [see Smith v. Balkcom, 660 F.2d 573, 580-581 (5th Cir. 1981) (Unit B) (recognizing that residual doubt about guilt, which is insufficient to be "reasonable" doubt and foreclose conviction, can be a significant mitigating factor)]--counsel did not do so. Instead, he informed the jury and the court that he had no evidence to present, and thereby gave the impression that there was no mitigating evidence.

Shortly thereafter, counsel strengthened and reconfirmed this impression in his one-minute closing argument in support of why the jury should recommend life imprisonment. Far from being an argument in support of life, the argument was an apology to the court for having to ask for life in the face of such a

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5 By approving only the trial judge's finding of the aggravating circumstances enumerated as 1, 2, 3, and 6 in these findings, the Florida Supreme Court impliedly held that circumstances 4 and 5 should not have been found.

death-appropriate case. Counsel opened his argument by allying himself with the horror felt by the victim's wife and the outrage felt by the community at the homicide of such a prominent citizen. (T. 1179-1180) Counsel then referred to the wisdom of the legislature in providing for a death penalty and to the state's position and evidence supporting its position that Mr. Adams should appropriately be put to death under this statute. (T. 1180) Then, without any reference to evidence in support of the view that life imprisonment should be imposed, he concluded,

> ... I find it necessary to ask for you to consider that you save his life in spite of all this and let this man live, for no other reason than that he is a man.

(T. 1180)[6] Counsel thus gave the trial court no reason to impose life instead of death, conceded the strength of the reasons for imposing death, and apologetically, asked for the imposition of life despite there being no reason he could think of for doing so.

Not surprisingly (from a lawyer who would represent a capital defendant in this manner), when he was faced with a claim that the foregoing amounted to ineffective assistance in state post-conviction proceedings, Mr. Adams' trial counsel refused to cooperate with post-conviction counsel. Nonetheless, through the effort of the attorney who assisted trial counsel in the week before and the week of his trial, and who thereafter represented Mr. Adams in clemency proceedings, Mr. Adams demonstrated that much mitigating evidence was available and could have been presented in his case. Affirmatively he could have produced evidence of favorable character traits. Having been born into a black sharecropper's family in rural Tennessee, Mr. Adams grew up under desperately poor conditions and was uneducated and functionally illiterate as a result, but he nonetheless assumed the role of heading his parents' household and supporting his family at the age of sixteen and did so successfully for twelve years thereafter (until he was imprisoned for the Tennessee rape charge). (PCT. 25-26, 30-31) During this time and after, Mr. Adams was an active church member with a special interest in

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6 The entire closing argument is set forth in the Statement of Material Facts, supra.

counseling children. (PCT. 31) By way of mitigating the effect of the aggravating factors against him, he could also have presented considerable evidence. He could have shown that his conviction for rape was, in all likelihood, unconstitutional -- having been obtained, as it was, for the rape of a white woman through a racially segregated, highly prejudicial proceeding, involving a segregated courtroom, an all-white jury, and the continuous highly visible confinement of Mr. Adams in shackles throughout the trial (without cause, because of a routine practice). (PCT. 20-21, 27) He could have shown that during the course of his ten-year incarceration for this charge, he became a trustee at a correctional facility for young women, and that his escape from custody in Tennessee involved no violence but simply his driving a truck, which he was, as a trustee, authorized to drive, away from this institution. (PCT. 26-27) Finally, he could have shown that, notwithstanding his trial testimony that he had been previously "convicted of a crime....[m]aybe five or more times" (T. 926), he had been convicted only three previous times--one of which was the rape conviction, and the other two of which (misdemeanors) were constitutionally invalid because they were uncounselled. (PCT. 18, 26)

The assistant counsel who testified about the post-trial investigation in which he unearthed all of this evidence further testified that trial counsel's file included <u>nothing</u> that would indicate trial counsel's investigation of, or even awareness of, this evidence. (PCT. 23-32) When asked what the trial file revealed as to any investigation of mitigating evidence that could be presented in Mr. Adams' sentencing trial, this attorney testified as follows:

> There were references to his wife here in town and some of the neighbors and their recollections of his behavior in the neighborhood for the approximately one year that he lived here prior to this trial. There was also a reference in the trial file to the fact that his wife knew his entire background. There were also indications during the interview of several of the state's witnesses, who were also his former employers, as to the potential for presenting evidence as to his fairly favorable work habits and I believe there were at least two previous jobs that were mentioned in the file, during the investigation of the case, that could have been used.

(PCT. 23) This was all that the file revealed as to potential mitigating evidence, but counsel noted that the file did not in any way refer to these matters as "mitigating evidence" or as "penalty phase" matters. (PCT. 24)

To avoid finding counsel ineffective on this record, the Eleventh Circuit utilized two presumptions derived from the general presumption that lawyers represent their clients effectively. First, the court presumed, without explicitly saying so, that counsel always conduct reasonably substantial ("adequate") investigation of plausible defenses. Nothing but such a presumption can explain the court's analysis of the "investigation" issue here:

> Adams has failed to establish that the decision to ask the jury for mercy reflected less than reasoned professional judgment. Adams did not call trial counsel to testify at the state hearing and gave no indication to the district court as to how trial counsel would testify at any district court hearing. Support counsel did testify before the state court that the trial file revealed no specific investigation into certain matters, such as Adams' work record, church activity and lack of education, but acknowledged that the file showed counsel had interviewed Adams' wife, neighbors and former employers. Notes in the file indicated the wife knew Adams' background completely. In short, there is no basis in this record for finding that counsel did not sufficiently investigate Adams' background.

(App. 3a-4a) (emphasis supplied). Even though the testimony of "support counsel" is inaccurately recounted here--by omitting reference to most of the mitigating evidence, summarized supra, which support counsel discovered and which was not reflected in the trial file--the court nonetheless at least recognized that the file lent support to the contention that there had been "no specific investigation into certain matters...." Further the court recognized that there had been some investigation of potential sources of mitigating evidence. With the facts thus showing some lack of investigation, as well as some preliminary investigation of material facts and sources of material facts, the court nonetheless concluded that "there is no basis in this record for finding that counsel did not sufficiently investigate Adams' background." (Id.) (emphasis supplied). Put another way, the record failed to show conclusively that counsel did not

conduct an adequate investigation--despite evidence that there was "no specific investigation into certain matters"--because there was an underlying, unspoken presumption that counsel will always conduct an adequate investigation. [7]

Second, the court presumed that trial counsel's decision not to present any mitigating evidence was tactical, and--since it was based upon adequate investigation (by virtue of a previous presumption)--was not ineffective.

> Assuming counsel's decision to forego presenting evidence of Adams' background was one of tactics, it does not appear to have been patently unreasonable. As the district court noted, counsel may have feared that if he presented evidence about defendant's background, the state could have refuted it by calling attention to damaging evidence in the record. For example, if counsel had offered evidence of Adams' family life, the state could have emphasized that Adams was separated from his wife at the time of the murder because of his relationship with a sixteen-year old girl. Similarly, if counsel had presented evidence of Adams' religious devotion, the state could have noted that he spent the Sunday before the Monday murder gambling. Counsel could have reasonably decided that raising Adams' background might do more harm than good, and that the best strategy was to ask for mercy. See Stanley v. Zant, 697 F.2d 955, 965 (11th Cir. 1983).

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[7] To corroborate the operation of this presumption here, compare King v. Strickland, 714 F.2d 1481 (11th Cir. 1983), where this presumption was not applied. In King, the petitioner made the same claim of capital sentencing trial ineffectiveness as Mr. Adams. The record underlying this claim was the following: (a) trial counsel moved for a one-day continuance of the penalty trial in order to discuss the proceeding with his client and to "speak to possible defense witnesses"; (b) the motion was denied, but defense counsel presented the testimony of one character witness anyway, referred the jury to mitigating aspects of the guilt phase testimony, and informed the jury of King's former attorney's favorable view of King's character; (c) in post-conviction proceedings, King demonstrated the availability and testimony of additional character witnesses who were asked to be at trial by defense counsel but who did not testify. Id. at 1490. In effect, therefore, King's record lent even greater support than Mr. Adams' record to the conclusion that counsel had reasonably investigated mitigating evidence--if a presumption that counsel had done so were to be applied. Counsel there had obviously investigated mitigating evidence, produced such evidence, and had available witnesses he did not call. Nonetheless, the court found upon this record precisely the opposite: the court found that "[t]here are indications in the record that counsel failed to conduct an exhaustive investigation for potential mitigating evidence," id. (emphasis supplied), and upon this basis subsequently held counsel ineffective, in part for his failure to investigate, id. at 1490-1491. Accordingly, a presumption of adequate investigation had to be operative in Adams--in order to defeat his claim of inadequate investigation--for the evidence of failure to investigate available mitigating evidence was greater in Adams than in King. The disparate results in these two cases cannot be explained in any other fashion.

(App. 4a).

The Eleventh Circuit's analysis in Adams thus approved capital sentencing trial representation in which counsel will be presumed to have acted reasonably and provided effective assistance even though (1) he has neither presented nor drawn the sentencer's attention to available, substantial mitigating evidence; (2) he has argued to the sentencer that while death seems appropriate, he is obliged nonetheless to ask the jury to impose life though he can think of no factual reason to do so; and (3) he has not testified in subsequent post-conviction proceedings as to why he pursued this line of defense.

This result, as well as the reasoning in support of this result, has created conflicts concerning the proper analysis of claims of ineffective assistance of counsel within the Eleventh Circuit and between the Fifth, Eleventh and Eighth Circuits which this Court should resolve. These conflicts include the following:

FIRST, whether the presumptions that attorneys conduct reasonably substantial investigation and take action based upon strategic choices have a proper role at all in the analysis of a claim that counsel has provided ineffective assistance in connection with a capital sentencing proceeding. While Mr. Adams' case is unique in the Fifth or the Eleventh Circuits insofar as the presumption of adequate investigation has been applied, both Circuits have expressly held that even if a lawyer fails to conduct a substantial investigation into a plausible line of defense, they will "presume, in accordance with the general presumption of attorney competence, that counsel's actions [thereafter] are strategic." Washington v. Strickland, 693 F.2d 1243, 1257 (5th Cir. 1982) (Unit B) (en banc), cert. granted, ___U.S.___, 103 S.Ct. 2451 (1983). Accord, Stanley v. Zant, 697 F.2d 955 (11th Cir. 1983). This presumption can be rebutted "when trial counsel testifies credibly at an evidentiary hearing that his choice was not strategic, ... or when certain of counsel's actions do not conform to a general pattern of a rational trial strategy." Washington, 693 F.2d at 1257-1258. Accord, Stanley, 697 F.2d at 966.

The Eighth Circuit has impliedly rejected the use of either of these presumptions in the analysis of capital sentencing trial claims of ineffective assistance in Pickens v. Lockhart, 714 F.2d 1455 (8th Cir. 1983). Faced with a district court decision denying a claim of ineffective assistance for failure to present any mitigating evidence due to the district court's presumption -- without any testimony from trial counsel to support it--that the decision not to present such evidence was strategic, the Eighth Circuit flatly disapproved this method of analysis:

> We cannot view the record to support such a conclusion. Given the severity of the potential sentence and the reality that the life of [trial counsel's] client was at stake, we find that it was incumbent upon Pickens' counsel to offer mitigating proof. There exists no indication in the record that [trial counsel] made any tactical decision; it appears much more likely that he abdicated all responsibility for defending his client in the sentencing phase. We cannot view such an abdication as meeting the level of effective assistance required under the Sixth Amendment.

714 F.2d at 1467 (emphasis supplied). By requiring that the record disclose the tactical basis for the failure to present mitigating evidence--and presuming no tactical basis if it does not--the Eighth Circuit has squarely rejected the presumption which the Fifth and Eleventh Circuits utilize (which presumes a tactical basis for action unless the record contradicts the presumption). It has accordingly, shifted the burden to the state to put on evidence that what appears to be ineffective assistance was in fact a reasonable trial strategy.[8]

SECOND, if presumptions of attorney competence are permissible, whether the presumption that counsel always conduct adequate pretrial investigations should be permitted. There is clear conflict within the Eleventh Circuit concerning the utilization of this presumption. As previously noted, this presumption was applied in Mr. Adams' case, but it was not

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[8] This view is further confirmed by Judge Arnold's joining the majority opinion in Pickens. Judge Arnold sat by designation on the Eleventh Circuit panel which decided Stanley v. Zant, supra. However, Judge Arnold filed a dissenting opinion in Stanley sharply disagreeing with the utilization of the presumption of trial strategy. Judge Arnold opined that "[i]t is not asking too much, when life is at stake, to require the State or counsel himself to explain a choice to present no evidence in mitigation." 697 F.2d at 974-975 (emphasis in original). Pickens embodies the rule advocated In Judge Arnold's Stanley dissent.

applied in the nearly identical case of King v. Strickland, supra. See n.7, supra. As illustrated by these two cases, the consequences of the utilization or non-utilization of this presumption are extraordinary. In King, where the presumption was not utilized, the court held that "counsel failed to conduct an exhaustive investigation for potential mitigating evidence." 714 F.2d at 1490. As a result, the failure to present additional mitigating evidence, "[could] not be deemed a strategic decision...," id. (emphasis supplied), and the ineffective assistance claim was resolved in the capital defendant's favor. By contrast in Adams, where the presumption was utilized, the court held that counsel had conducted an adequate investigation of potential mitigating evidence (App. 4a), thereby bringing into play the presumption that counsel's decision "to forego presenting evidence of Adams' background was one of tactics." Id. With this, the court applied the most difficult of all tests for a habeas corpus petitioner to meet: "a strategic decision to pursue less than all plausible lines of defense...if counsel first adequately investigated the rejected alternatives...will be held ineffective only if it was so patently unreasonable that no competent attorney would have chosen it." (App. 3a, 4a) Pursuant to this test, Mr. Adams' claim failed.[9] Since the presumption of adequate investigation thus produced opposite results in nearly identical cases, the propriety of its use must be resolved by this Court.

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[9] Even under this test, however, the claim should not have failed. The presumed reasonable basis for foregoing the presentation of mitigating evidence was the tendency of such evidence to invite the state to emphasize some negative aspects of Mr. Adams' character already in evidence: his gambling and his "running around" with a young woman not his wife. (App. 4a) However, the vast majority of the unpresented mitigating evidence--see pp. 6-7, supra--would have been absolutely unaffected by "emphasis" by the state of this evidence. The unpresented evidence focused instead upon Mr. Adams' overcoming extraordinary odds to become a responsible, dependable adult from the age of 16 on (a trait recognized even by the prison authorities in Tennessee) and upon the mitigating aspects of the aggravating factors lined up against him. In no fashion would this evidence have been "refuted" by the "damaging" evidence of gambling and "running around." Moreover, when the failure to present the available evidence is viewed in this light and is coupled with counsel's affirmatively damaging closing argument--a "contextual" view which the Eleventh Circuit failed to undertake--the "patently unreasonable" strategic choice of counsel not to present mitigating evidence becomes clear.

THIRD, if presumptions of attorney competence are permissible, whether the presumption that counsel's actions are strategic must be tested by the entirety of the record or can be tested instead by limited reference to selected portions of the record. As previously noted, both the Fifth and Eleventh Circuits have held that the presumption that counsel's actions are strategic can be rebutted, when counsel testifies that they were not strategic or "when certain of counsel's actions do not conform to a general pattern of a rational trial strategy." Washington v. Strickland, supra, 693 F.2d at 1258. Accord, Stanley v. Zant, supra, 697 F.2d at 966 ("where the circumstances clearly show that counsel's failure to offer mitigating evidence could not have been based on reasonable strategy"). When testing counsel's actions in Mr. Adams' case against a "general pattern of a rational trial strategy," however, the Eleventh Circuit did not examine the entire record. It examined only that evidence in the record which might have become more damaging if counsel had presented mitigating evidence, concluding that the decision to "forego" mitigating evidence was, in context, part of an overall rational strategy. (App. 4a) Had it examined the entire record, however, the court could not have reached this same conclusion, for it would necessarily have faced counsel's seriously damaging closing argument. In two other cases, King v. Strickland, supra, and Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983), the court has recognized that a damaging closing argument can turn an otherwise proper strategic choice not to present mitigating evidence into an ineffective strategy, because

> a vital difference exists between not producing any mitigating evidence and emphasizing to the ultimate sentencer that the defendant is a bad person or that there is no mitigating evidence.

Douglas, at 1557. Such a closing argument makes the finding of ineffectiveness "[cry] out from a reading of the transcript." Id. Thus, only because the court in Mr. Adams' case refused to review counsel's "no evidence strategy" in light of counsel's overall sentencing trial effort on behalf of Mr. Adams did it reach the result it did. Accordingly, the scope of counsel's

effort against which his choice not to present mitigating evidence must be tested is the final issue in need of resolution by this Court.

While the Court's grant of certiorari in Washington v. Strickland, supra, may include a resolution of these issues regarding the proper use of presumptions in the analysis of ineffective assistance of counsel claims, it also may not resolve these issues. As framed, the questions presented by Washington focus on the degree of prejudice which must be shown in order for an ineffective assistance claim to succeed. Nonetheless, as powerfully demonstrated by Mr. Adams' case, the presumption issues are just as much in need of resolution by this Court as is the prejudice issue. For this reason, justice demands that the issues be resolved--in one case or the other--and that the egregious injustice done to Mr. Adams be corrected, by granting his petition for a writ of certiorari.

II. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE LOWER COURT'S APPROVAL OF THE FELONY MURDER AGGRAVATING CIRCUMSTANCE IN THIS CASE DIRECTLY CONFLICTS WITH THIS COURT'S RECENT PRONOUNCEMENTS IN ZANT V. STEPHENS CONCERNING THE NECESSARY FUNCTION OF STATUTORY AGGRAVATING CIRCUMSTANCES.

The Eleventh Circuit correctly recognized that Mr. Adams was indicted for and convicted only of felony murder (App. 4a). The state sentencing court relied upon felony murder as an aggravating circumstance to support the death sentence. But, in Florida as elsewhere, individuals convicted of felony murder, as distinguished from premeditated murder, are deemed less deserving of death. Yet the sentencing court in Mr. Adams' case used felony murder as the basis of an aggravating circumstance. Thus, the sentencing court "attached the 'aggravating' label ... to conduct that actually should militate in favor of a lesser penalty." Zant v. Stephens, ___U.S.___, 103 S.Ct. 2733, 2747 (1983). This case should be remanded for reconsideration in light of Zant v. Stephens.

As the statement of the facts in this petition makes clear, this was from start to finish a felony murder case only. The indictment was based solely upon a theory of felony murder and

not upon any theory of premeditated intent to take a human life. The state's case at trial was grounded exclusively on a theory of felony murder. In his closing argument, the prosecutor stated that the only issue in the case was whether the deceased was killed during a robbery (T. 1050), thus relying solely upon felony murder. During the jury charge conference, both the prosecutor and the judge agreed that there was "no premeditation involved in this thing" (T. 1004), and the prosecutor further underscored that this was a case where "premeditated intent or design is not involved" (T. 1006). Thus, it was agreed that the jury would only be instructed on felony murder (T. 1015) and in fact the only ground on which the jury was instructed that it could return a verdict of guilty of first degree murder was upon a finding that Mr. Adams had killed the deceased during the course of a robbery "even though there is no premeditated design or intent to kill" (T. 1126, 1145). In light of these instructions, the jury's general verdict (T. 1151) could only have been based upon a finding of felony murder. Moreover, the sentencing judge's findings in support of the death sentence do not include any finding that the killing was deliberate. The Florida Supreme Court offered the death sentence on the basis of felony murder, Adams v. State, 341 So.2d 765, 767-68 (Fla. 1977), and the Eleventh Circuit affirmed the denial of habeas corpus relief despite treating the homicide solely as a felony murder (App. 4a-5a).

The element of felony murder in this case is a mitigating, not an aggravating, circumstance. In Florida, as in most states, those convicted of felony, rather than premeditated, murder are considered less deserving of the death penalty. See generally Dressler, The Jurisprudence of Death By Another: Accessories and Capital Punishment, 51 U. COL. L. REV. 17 (1979); Note, The Constitutionality of Imposing the Death Penalty for Felony Murder, 15 U. HOUSTON L. REV. 356 (1978). The Florida Supreme Court stated in McCaskill v. State, for example, that juries "have been reluctant to recommend the imposition of the death penalty in all but the most aggravated [robbery-murder] cases despite general knowledge and concern of the citizenry over the

substantial increase in crime." 344 So. 2d at 1280. Similarly, the Arizona Supreme Court has held that "the giving of a felony murder instruction may be considered as a mitigating circumstance." State v. Schad, 633 P.2d 366, 383 (Ariz. 1981), cert. denied, 455 U.S. 983 (1982). See also State v. Gillies, 662 P.2d 1007, 1020-22 (Ariz. 1983); State v. Zarogoza, 654 P.2d 22, 29 (Ariz. 1983). It was not considered as a mitigating circumstance in this case by the judge or jury -- the jury was not instructed that it could consider the lack of intent as a mitigating factor.

It is important to define what Mr. Adams means by "felony murder." On the one hand, the term embodies our society's judgment that deliberate, intentional and premeditated murders, when they occur in the course of certain felonies, may justify imposition of the death penalty. This is the principle embodied in Florida's felony murder aggravating circumstance, Fla. Stat. §921.141 (6)(d), approved by this Court in Proffitt v. Florida, 428 U.S. 242 (1976). But the meaning of "felony murder" relevant to this case is quite different. Under this variant of the felony murder doctrine, one whose conduct brought about an unintended death in the commission of a felony is guilty of murder. See generally LaFave & Scott, Handbook on Criminal Law, 545-561 (1972). In this sense, a finding of felony murder is a mitigating circumstance because it is based on a legal fiction: the notion that the specific intent for the underlying felony may be transferred so as to satisfy the specific intent requirement of first degree murder. Such a fiction may generally benefit society by deterring those engaged in felonies from killing recklessly or negligently. But such fictions will not do when the issue is life or death. This Court recognized as much in Enmund v. Florida ___U.S.___, 102 S.Ct. 3368 (1982). Enmund was an aider and abettor only to the underlying felony; he did not intend the murder that ensued. This Court surveyed the felony murder statute nationally and considered that our society considers death a disproportionate penalty for crimes similar to

Enmund's. "American criminal law has long considered a defendant's intention -- and therefore his moral guilt -- to be critical to the degree of his criminal culpability." Id. at ___, 102 S.Ct. at 3378.

Enmund makes clear that the "intent" at issue in deciding who dies is the real intent possessed by the defendant at the time of the crime, not some intent artificially manufactured to satisfy the felony murder doctrine. The facts of this case present a graphic illustration of why felony murder should, in the sense of non-premeditated murder, be deemed a mitigating, rather than an aggravating circumstance. The crime in Mr. Adams' case was a non-deliberate killing. The perpetrator entered the residence unarmed. At the time the perpetrator entered, no one was at home (T. 267, 324-25, 442-46). Sometime later, the deceased returned and came upon the perpetrator (T. 241, 324-25). A struggle then ensued in which the deceased received injuries from blows by a fireplace poker, which caused his death the next day. The deceased was conscious at the time he was found, which was shortly after the perpetrator departed (T. 447-48).

Petitioner has shown that (1) he was indicted, tried, convicted and sentenced on the basis of felony murder alone; (2) in Florida, as elsewhere, felony murder, as opposed to premeditated murder, is deemed less deserving of death; (3) but in this case felony murder formed the basis of an aggravating circumstance. The danger foreseen by this Court in Zant v. Stephens came to pass here: the sentencer "attached the 'aggravating' label to conduct that actually should militate in favor of a lesser penalty." ___U.S. at ___, 103 S.Ct. at 2747. This case should be remanded for reconsideration in light of Zant v. Stephens.

III. THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER FLORIDA'S HAPHAZARDLY APPLIED PROCEDURAL DEFAULT RULE CAN BAR FEDERAL HABEAS CORPUS REVIEW OF CAPITAL SENTENCING ISSUES.

The jury instructions at Mr. Adams' capital sentencing trial, which merely tracked the language of the Florida statute, could have led a reasonable juror to believe that he or she was

limited to considering only statutory mitigating circumstances, in violation of the requirement of Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982) that the sentencer consider all relevant mitigating evidence. This reasonable construction of the court's charge would have precluded the consideration of significant factors in mitigation. Mr. Adams raised this issue in federal habeas corpus proceedings relying primarily on the controlling decision in Washington v. Watkins, 655 F.2d 1346, 1367-1368 (5th Cir.), reh. den., 662 F.2d 1116 (5th Cir. 1981), cert. den., 456 U.S. 949 (1982). The Court of Appeals, however, rejected this claim, solely on procedural grounds, holding that Mr. Adams' procedural default in the state courts[10] precluded review because he failed to demonstrate "prejudice" as required by Wainwright v. Sykes, supra. (App. 6a-7a)

Certiorari should be granted on this issue to resolve an extraordinarily important question pertaining to the application of Wainwright v. Sykes. Florida applies its procedural default rules to the review of capital sentencing issues in a haphazard, fundamentally inconsistent manner -- reviewing in one case the merits of an issue despite a procedural default in raising it and in the next, raising the very same issue, declining to review the issue on the merits because of a procedural default. Because the review of a capital sentencing issue on the merits in federal court can mean the difference between life and death, certiorari should be granted to decide whether Florida's application of its procedural default rules to capital sentencing issues can bar review of those issues in federal court.

The application of the procedural default principles of Wainwright v. Sykes is warranted only if the state courts have rejected a claim "on the basis of an independent and adequate state procedural ground that bars the federal courts from addressing the issue on habeas corpus." County Court of Ulster County v. Allen, 442 U.S. 140, 148 (1979). Under Wainwright v. Sykes the failure to raise a claim in the manner and at the time

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[10] Mr. Adams "did not object to the instruction as required by Fla.R.Crim.P. 3.390 (d)." (App. 6a)

required by the state law, which results in the state courts' refusal to entertain the merits of the claim, is such an "independent and adequate state procedural ground." However, if the procedural default rule is followed in one case but not in another raising the same issue in the same "default" posture, the refusal to review the issues in the first case for procedural default cannot be an "independent and adequate state procedural ground." In that case, the procedural default "rule" is merely a device by which the state court can turn on or off at will its receptivity to constitutional claims. Barr v. City of Columbia, 378 U.S. 146, 149-50 (1964). See also NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 458 (1958). This is precisely the case with Florida's procedural default "rule."

In Straight v. Wainwright, 422 So.2d 827 (Fla. 1982), the defendant raised the very same instructional issue in the very same procedural posture as that presented by Mr. Adams. There, however, the Florida court did not refuse to entertain the issue because of the defendant's failure to object to it at trial. Rather, it entertained the issue on the merits without even the slightest reference to Straight's procedural default. Straight involved an appeal of the denial of a motion for state post-conviction relief, coupled with an original petition for a writ of habeas corpus in the Florida Supreme Court raising the ineffective assistance of former counsel on the direct appeal. In his original petition for a writ of habeas corpus, Straight asserted that the failure of his former counsel to raise the instructional issue on direct appeal denied him the effective assistance of counsel. 422 So.2d at 829-830. In his post-conviction proceeding appeal, Straight also raised the jury instruction issue on its merits. 422 So. 2d at 831. The Florida Supreme Court reached and denied the ineffective assistance claim, and it also entertained and decided the merits of the claim as raised in the Rule 3.850 proceedings, with no reference at all to Straight's procedural default:

> **Rule 3.850 Appeal**
>
> **Appellant argues that the imposition of the sentence of death upon him was violative of the Eighth and Fourteenth Amendments to the United States Constitution in that the instructions to**

> the jury had the effect of restricting mitigating considerations to the statutory mitigating circumstances. Appellant cites Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed. 2d 973 (1978), for the proposition that such restrictive instructions may render a death sentence violative of the Eighth Amendment.
>
> As we stated above in responding to the argument on ineffective appellate counsel, this contention is without merit. Our capital felony sentencing law and jury instructions based thereon do not limit consideration to statutory mitigating circumstances. See Peek v. State, 395 So.2d 492 (Fla.), cert.denied, 451 U.S. 964, 101 S.Ct. 2036, 68 L.Ed.2d 342 (1981); Songer v. State, 365 So.2d 696 (Fla. 1978) (on rehearing), cert.denied, 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979).

422 So.2d at 831.

The absolute inconsistency in the Florida Supreme Court's application of Florida's procedural default rule, as illustrated by the court's treatment of this issue in Straight, is by no means rare. It has occurred with such frequency in the Florida court's treatment of capital sentencing issues that this Court must recognize and rule that there is no procedural default rule with respect to capital sentencing issues in Florida that can serve as an "independent and adequate state procedural ground" under Wainwright v. Sykes.

The opinions of the Florida Supreme Court in the Rule 3.850 appeals of capital defendants over the past four years reveal an almost pathological approach-avoidance conflict to the procedural default rule. In some Rule 3.850 cases that have raised errors in the consideration of aggravating and mitigating circumstances or in the scope of the circumstances considered, the Florida court has flatly refused to reach the merits of the issues presented because of procedural default. See Alvord v. State, 396 So.2d 184 (Fla. 1981); Smith v. State, 400 So.2d 956, 958-959 (Fla. 1981); Goode v. State, 403 So.2d 931, 932 (Fla. 1981); Dobbert v. State, 409 So.2d 1053, 1058 (Fla. 1982); Demps v. State, 416 So.2d 808, 809 (Fla. 1982); Songer v. State, 419 So.2d 1044, 1047 (Fla. 1982). In other cases raising the same issues in precisely the same posture, however, the court has reached the merits of the issues without any reference at all to a procedural default bar. See Douglas v. State, 373 So.2d 895, 896-897 (Fla. 1979); Adams v. State, 380 So.2d 423, 424 (Fla. 1980); Demps v.

State, supra, 416 So.2d at 809;[11] Ruffin v. State, 420 So.2d 591, 594 (Fla. 1982); Hall v. State, 420 So.2d 872, 873 (Fla. 1982). In some 3.850 cases raising errors in the penalty trial instructions concerning the scope of the aggravating or mitigating circumstances (as in Mr. Adams' case) or the manner in which aggravating and mitigating circumstances must be weighed against each other, the Florida court has also flatly refused to reach the merits of the issues because of procedural default. See Smith v. State, supra, 400 So.2d at 958-959; Goode v. State, supra, 403 So.2d at 932; Ford v. State, 407 So.2d 907, 908 (Fla. 1981); Antone v. State, 410 So.2d 157, 163 (Fla. 1982); Thomas v. State, 421 So.2d 160, 162 (Fla. 1982). Yet in other cases raising precisely the same instructional errors in precisely the same posture, the court has reached the merits of the issues without mentioning the procedural default "rule." See Hall v. State, supra, 420 So.2d at 874; Straight v. Wainwright, supra, 422 So.2d at 831. There can be only two explanations for this inconsistency: the Florida Supreme Court has acted arbitrarily or there is no procedural default rule with respect to capital sentencing issues.[12] Under either theory, the federal courts

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11 In Demps, the court refused on procedural default grounds to reach another similar issue respecting the scope of mitigating circumstances admitted into evidence.

12 The Florida Supreme Court has recently provided a partial, though Catch-22-like explanation for the inconsistency among these rulings. Since the effective date of the current death penalty statue, as this Court recognized in Proffitt v. Florida, the Florida court has consistently held that it has an independent duty to review the propriety of the imposition of the death penalty in connection with the direct appeal of each capital case. See, e.g. State v. Dixon, 283 So.2d 1 , 10 (Fla. 1973); Songer v. State, 322 So.2d 481 (Fla. 1975); Aldridge v. State, 351 So.2d 942, 944 (Fla. 1977); Hargrave v. State, 366 So.2d 1, 4-5 (Fla. 1979); McCampbell v. State, 421 So.2d 1072, 1074 (Fla. 1982). This independent duty requires the court to "examine the record to be sure that the imposition of the death sentence complies with all the standards set by the Constitution, the legislature and the Courts." Goode v. State, 365 So.2d 381, 384 (Fla. 1979). In the exercise of this independent duty on direct appeal, therefore, the court can and does review any issue concerning the penalty trial even though that issue has not been raised by the parties. See, e.g., LeDuc v. State, 365 So.2d 149, 150 (Fla. 1978); Goode v. State, 365 So.2d at 384; Jacobs v. State, 396 So.2d 713, 717-718 (Fla. 1981).

The catch is this: In two cases decided this year, the Florida court explained that the independent review conducted on direct appeal has sometimes included penalty trial issues which were not raised. Thus, when the petitioner raised such issues for the first time in Rule 3.850 proceedings, the court rejected them on the ground that they had already been determined -- albeit sua sponte and without direct reference -- on direct appeal. Palmes

should reach the merits of any capital sentencing issue for which state remedies have been exhausted because there is no "adequate" state ground.[13]

Accordingly, certiorari should be granted to resolve this critical question. The determination of a capital sentencing issue on its merits can mean the difference between life and death. Without a resolution by this Court, some capital defendants may live because in their cases, the Florida courts did not find a procedural default on issues raised for the first time in collateral proceedings. At the same time, others may die because in their cases, the Florida courts did find a procedural default on the very same issues raised in the very same procedural posture. The lightning-like arbitrariness of Florida's procedural default "rule" cannot therefore be sanctioned, because it results in the same random cruelty condemned in Furman v. Georgia, 408 U.S. 238 (1972).

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v. State, 425 So.2d 4, 6 (Fla. 1983); Armstrong v. State, 429 So.2d 287, 288-289 (Fla. 1983).

[13] Despite its en banc decision in Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983), upon which the Eleventh Circuit based its disposition of this instructional issue in Mr. Adams' case, the Eleventh Circuit (acting as Unit B of the Fifth Circuit) had previously recognized that "in death cases, the Florida Supreme Court exercises a special scope of review enabling them to excuse procedural defaults." Henry v. Wainwright, 686 F.2d 311, 314 (5th Cir. 1982) (Unit B). This recognition, in part, led the court to reaffirm the propriety of its decision on the merits of the issue presented in Henry, despite a question concerning procedural default under Florida's procedural default rule. Thus, to the extent that the court, acting as the Fifth Circuit (Unit B), has already adopted, in Henry, the principle which Mr. Adams now urges this Court to consider, there is a conflict between "circuits" also in need of resolution.

CONCLUSION

For the reasons expressed herein, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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Counsel for Petitioner

October 31, 1983

No. 83-5701

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

JAMES ADAMS,
Petitioner,

vs.

LOUIE L. WAINWRIGHT, etc.,
Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, JAMES ADAMS, who is imprisoned on Florida's Death Row, asks for leave to file the accompanying Petition for Writ of Certiorari without pre-payment of costs and to proceed in forma pauperis pursuant to Rule 46 of the Rules of this Court. Petitioner proceeded in forma pauperis at all times in the state and federal courts below. Undersigned court-appointed counsel has at all times represented Mr. Adams. Petitionvr has attached hereto his affidavit in substantially the form prescribed by Fed. Rules App. Proc., Form 4, and the Rules of this Court.

Respectfully Submitted,

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BY Richard H. Burr III
RICHARD H. BURR, III
Of Counsel to the Public Defender

Counsel for Petitioner.

No. 83-5701

IN THE

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Respondent.

****

AFFIDAVIT IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS

I, JAMES ADAMS, being first duly sworn, depose and say that I am the petitioner in the above entitled cases; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to relief.

I further swear that the responses which I have made to questions and instructions below are true.

1. Are you presently employed? Yes [ ] No [✓]

a. If the answer is "Yes", state the amount of your salary or wages per month, and give name and address of your employer.

b. If the answer is "No", state the date of last employment and the amount of the salary and wages per month which you received. 1973, $400.00 per month

2. Have you received within the past twelve months any money from any of the following sources?

a. Business, profession or from self employment? Yes [ ] No [✓]
b. Rent payments, interest or dividends? Yes [ ] No [✓]
c. Pensions, annuities or life insurance payments? Yes [ ] No [✓]
d. Gifts or inheritance? Yes [ ] No [ ]
e. Any other sources? Yes [✓] No [ ]

If the answer to any of the above is "yes", describe each source of money and state the amount received from each during the past twelve months. Gifts from friends. Approximately $15.00 or less

3. Do you own cash, or do you have money in a checking or saving account? Yes [✓] No [ ] (Include any funds in prison accounts)

If answer is "yes", state the total value of the items owned. Prison Account, $100.00.

4. Do you own any real estate, stocks, bonds, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes [ ] No [X]

If the answer is "yes" describe the property and state its approximate value. _____

_____

5. List the persons who are dependent upon your support, state your relationship to those persons and indicate how much you contribute toward their support. None

_____

I understand that a false statement to any questions in this affidavit will subject me to penalties for perjury.

"I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED on November 9 1983
(Date)

Donna Adams
(Signature)

STATE OF FLORIDA)

COUNTY OF BRADFORD)

JAMES ADAMS being first duly sworn under oath, presents that he has read and subscribed to the above and states that the information therein is true and correct.

Donna Adams
Signature of Petitioner

SUBSCRIBED and SWORN to before me this 9 day of November, 1983.

Bonnie Burnside
NOTARY PUBLIC

My Commission Expires:

No. 83-5701

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

JAMES ADAMS,
Petitioner,

vs.

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
224 Datura Street/13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

RICHARD H. BURR, III
Of Counsel

TATJANA OSTAPOFF
MICHAEL A. MELLO
Assistant Public Defenders

Counsel for Petitioner

I N D E X

James ADAMS, Petitioner,

v.

Louie L. WAINWRIGHT, Respondent.

No. 82-5595.

United States Court of Appeals,
Eleventh Circuit.

July 18, 1983.

Petitioner, who was convicted of first-degree murder in a Florida state court and sentenced to death, appealed from an order of the United States District Court for the Southern District of Florida, Gonzalez, J., which denied his petition for a writ of habeas corpus. The Court of Appeals held that: (1) petitioner failed to establish that his counsel's decision to make a plea of mercy, in lieu of presenting any mitigating evidence, was not one of strategy taken after he reasonably investigated other plausible options or that counsel's decision, if tactical, was patently unreasonable; furthermore, other actions for which petitioner faulted his counsel did not amount to ineffectiveness, and (2) death penalty was not grossly disproportionate and excessive in felony-murder case in which it was established

that defendant personally killed victim, savagely beating him to death during course of a robbery.

Affirmed.

1. **Criminal Law** ⇐641.13(1)
Habeas Corpus ⇐25.1(6)

Even if in retrospect trial counsel's strategy appears to have been wrong, counsel's decision will be held ineffective only if it was so patently unreasonable that no competent attorney would have chosen it and burden of proof to establish ineffectiveness and prejudice is on habeas petitioner.

2. **Criminal Law** ⇐641.13(6)

Petitioner failed to establish that his counsel's decision to make a plea of mercy, in lieu of presenting any mitigating evidence in murder trial, was not one of strategy taken after he reasonably investigated other plausible options or that counsel's decision, if tactical, was patently unreasonable; furthermore, other actions for which petitioner faulted his counsel did not amount to ineffectiveness.

3. **Criminal Law** ⇐641.13(1)

Effective counsel does not mean errorless counsel.

4. **Criminal Law** ⇐1206(2)
Homicide ⇐354

Death penalty was not grossly disproportionate and excessive in felony murder case in which it was established that defendant personally killed victim, savagely beating him to death during course of a robbery. West's F.S.A. § 782.04(1)(a).

5. **Criminal Law** ⇐1144.15

Jury is presumed to follow jury instructions.

6. **Criminal Law** ⇐1144.15

In murder trial, jury was presumed to have followed instruction that it could consider only the aggravating circumstances listed in the statute during penalty phase of trial.

7. **Homicide** ⇐354

In felony-murder case governed by Florida law, trial court did not err in finding that the murder was especially heinous, atrocious, or cruel.

8. **Criminal Law** ⇐1144.17

In felony-murder trial governed by Florida law, it would be assumed that trial judge followed his own jury instructions and considered only statutory aggravating circumstances in sentencing defendant to death.

9. **Habeas Corpus** ⇐85.5(1)

Petitioner failed to show that jury in his murder trial perceived that it could not consider nonstatutory mitigating factors.

10. **Habeas Corpus** ⇐85.5(1)

Petitioner, who had no specific evidence that Florida Supreme Court relied on nonrecord information in affirming his conviction for first-degree murder and death sentence, was not entitled to habeas relief based on his claim that Florida Supreme Court received nonrecord information in connection with review of his case.

11. **Habeas Corpus** ⇐85.5(15)

Petitioner, who failed to proffer any evidence that death sentence in his case was product of intentional discrimination, was not entitled to habeas relief on basis of his claim that death penalty in Florida was imposed disproportionately in cases involving a white victim and in cases tried in certain county.

12. **Constitutional Law** ⇐270(3)

Disparate impact in sentencing alone is insufficient to establish a violation of Fourteenth Amendment; there must be a showing of an intent to discriminate and only if the evidence of disparate impact is so strong that the only permissible inference is one of intentional discrimination will it alone suffice. U.S.C.A. Const.Amend. 14.

Craig S. Barnard, Chief Asst. Public Defender, Jerry L. Schwartz, Tatjana Ostapoff, Asst. Public Defenders, West Palm Beach, Fla., for petitioner.

Robert L. Bogen, Sharon Lee Stedman, Asst. Attys. Gen., West Palm Beach, Fla., for respondent.

Appeal from the United States District Court for the Southern District of Florida.

Before RONEY and CLARK, Circuit Judges, and GIBSON *, Senior Circuit Judge.

PER CURIAM:

Convicted of first degree murder and sentenced to death, James Adams appeals the denial of his petition for a writ of habeas corpus. All of Adams' arguments on appeal concern the imposition of the death penalty. We affirm essentially on the basis of the district court's extensive opinion. We briefly review the case and address Adams' contentions *seriatim* as presented to us.

In the course of a robbery at the victim's home, Adams beat Edgar Brown senseless with a firepoker. Brown died the following day. A Florida jury found Adams guilty of murder and recommended the death penalty, which the trial judge imposed. The Florida Supreme Court affirmed the conviction and sentence. *Adams v. State*, 341 So.2d 765 (Fla.1976). The United States Supreme Court denied certiorari. *Adams v. Florida*, 434 U.S. 878, 98 S.Ct. 232, 54 L.Ed.2d 158 (1977). The Florida Supreme Court later denied an application for relief based on the trial court's alleged reliance on confidential and erroneous information during the penalty phase of the trial, *Adams v. State*, 355 So.2d 1208 (Fla.1978), and the United States Supreme Court again denied certiorari. *Adams v. Florida*, 439 U.S. 947, 99 S.Ct. 340, 58 L.Ed.2d 338 (1978). When the Florida state courts denied any collateral relief, *Adams v. State*, 380 So.2d 423 (Fla.1980), Adams filed his petition for habeas corpus relief in federal district court. The district court denied the writ in an unpublished opinion, but granted a certificate of probable cause and a stay of judgment pending appeal.

Ineffective Assistance of Counsel

Adams argues his counsel was ineffective during the penalty phase of the trial because he failed to present any mitigating evidence. Counsel's closing argument consisted exclusively of a plea for mercy.

[1] The crucial question is whether counsel's decision to make a plea for mercy, in lieu of presenting any mitigating evidence, was one of strategy taken after he reasonably investigated other plausible options. In *Washington v. Strickland*, 693 F.2d 1243, 1253–54 (5th Cir. Unit B 1982) (en banc), *cert. granted*, — U.S. —, 103 S.Ct. 2451, 75 L.Ed.2d — (1983), we observed that a strategic decision to pursue less than all plausible lines of defense will rarely, if ever, be deemed ineffective if counsel first adequately investigated the rejected alternatives. *Cf. Westbrook v. Zant*, 704 F.2d 1487, 1500 (11th Cir.1983) (strategic decisions generally do not render counsel ineffective). Even if in retrospect the strategy appears to have been wrong, the decision will be held ineffective only if it was so patently unreasonable that no competent attorney would have chosen it. *Washington v. Strickland*, 693 F.2d at 1254; *see also Ford v. Strickland*, 696 F.2d 804, 820 (11th Cir.1983) (en banc); *Baldwin v. Blackburn*, 653 F.2d 942, 946 (5th Cir.1981), *cert. denied*, 456 U.S. 950, 102 S.Ct. 2021, 72 L.Ed.2d 475 (1982); *Beckham v. Wainwright*, 639 F.2d 262, 265 (5th Cir.1981). The burden of proof to establish ineffectiveness and prejudice is on the petitioner. *Washington v. Strickland*, 693 F.2d at 1258, 1262; *Adams v. Balkcom*, 688 F.2d 734, 738 (11th Cir.1982).

[2] Adams has failed to establish that the decision to ask the jury for mercy reflected less than reasoned professional judgment. Adams did not call trial counsel to testify at the state hearing and gave no indication to the district court as to how trial counsel would testify at any district court hearing. Support counsel did testify before the state court that the trial file revealed no specific investigation into cer-

* Honorable Floyd R. Gibson, U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

tain matters, such as Adams' work record, church activity and lack of education, but acknowledged that the file showed counsel had interviewed Adams' wife, neighbors and former employers. Notes in the file indicated the wife knew Adams' background completely. In short, there is no basis in this record for finding that counsel did not sufficiently investigate Adams' background.

Assuming counsel's decision to forego presenting evidence of Adams' background was one of tactics, it does not appear to have been patently unreasonable. As the district court noted, counsel may have feared that if he presented evidence about defendant's background, the state could have refuted it by calling attention to damaging evidence in the record. For example, if counsel had offered evidence of Adams' family life, the state could have emphasized that Adams was separated from his wife at the time of the murder because of his relationship with a sixteen-year old girl. Similarly, if counsel had presented evidence of Adams' religious devotion, the state could have noted that he spent the Sunday before the Monday murder gambling. Counsel could have reasonably decided that raising Adams' background might do more harm than good, and that the best strategy was to ask for mercy. *See Stanley v. Zant*, 697 F.2d 955, 965 (11th Cir.1983).

[3] The other actions for which Adams faults his counsel do not amount to ineffectiveness. Adams argues his attorney should have objected first when, during the penalty phase, the state brought out that the victim of a prior rape committed by Adams was white, and second when, during argument thereafter, the state's attorney mentioned that the murder victim was a prominent, long-time local resident and Adams was from Tennessee. Defense counsel probably should have objected on both occasions. Effective counsel, however, does not mean errorless counsel. *Adams v. Balkcom*, 688 F.2d at 738; *Goodwin v. Balkcom*, 684 F.2d 794, 804 (11th Cir.1982), *cert. denied*, — U.S. —, 103 S.Ct. 1798, 76 L.Ed.2d 364 (1983); *Young v. Zant*, 677 F.2d 792, 798 (11th Cir.1982); *Mylar v. Alabama*, 671 F.2d 1299, 1300 (11th Cir.1982), *petition for cert. filed*, 50 U.S.L.W. 3984 (U.S. June 15, 1982) (No. 81-2240). In any event, Adams has not shown the failure to object worked to his "actual and substantial disadvantage." *Washington v. Strickland*, 693 F.2d at 1242. Put another way, it does not appear that objections by counsel would have worked to Adams' advantage in any material way.

Adams complains about the failure to "clarify" his criminal record which had been brought out at trial. Adams contends that when he testified at trial on cross that he had five or more previous convictions, he was mistaken. According to Adams, counsel should not only have realized this mistake, but also should have discovered the allegedly questionable constitutionality of three convictions. By calling attention to Adams' prior record, however, counsel might have hurt his client. The record does not establish the number of prior convictions, but there is no doubt that Adams had at least three previous convictions, including one for rape. Adams failed to establish prejudice. The government raised only the rape conviction during the sentencing proceeding, the judge properly instructed the jury to consider only statutory aggravating circumstances, and the trial court found numerous statutory aggravating circumstances to warrant the death sentence.

Imposition of the Death Penalty for Felony Murder

[4] As the murder occurred during the course of a robbery, Adams was indicted for and convicted of felony murder. Florida law classifies as first degree murder, punishable by death, a homicide committed without premeditation during the commission of certain felonies, including robbery. Fla.Stat.Ann. § 782.04(1)(a). Relying principally on *Enmund v. Florida*, — U.S. —, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), Adams argues the death sentence in this case is disproportionate and excessive because it is based on felony murder without a specific finding of intent to kill.

Although *Enmund* did hold that the death sentence could not be imposed where no intent is shown and the killing occurs during the perpetration of a felony, that case is readily distinguishable. Defendant Earl Enmund in that case was waiting in the getaway car during a planned robbery when one or both of his two co-felons shot and killed two victims who resisted the robbery. The Supreme Court held the death penalty disproportionate to Enmund's culpability, reasoning that he personally "did not kill or attempt to kill" or have "any intention of participating in or facilitating a murder." — U.S. at ——, 102 S.Ct. at 3377, 73 L.Ed.2d at 1152. Here Adams personally killed his victim, savagely beating him to death. Adams acted alone. He is fully culpable for the murder. Under these circumstances, the death penalty is not "grossly disproportionate and excessive." *Coker v. Georgia*, 433 U.S. 584, 592, 97 S.Ct. 2861, 2865, 53 L.Ed.2d 982 (1977) (plurality opinion).

Adams also argues that Florida has impermissibly made the death penalty the "automatically preferred sentence" in any felony murder case because one of the statutory aggravating factors is the murder taking place during the course of a felony. The short answer is that the United States Supreme Court has upheld the Florida death penalty statute, including necessarily the use of this statutory aggravating factor. *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). Florida does not mandate the death penalty in all felony murder cases. The defendant is not precluded under Florida law from presenting any mitigating factors. *See id.* at 250 n. 8, 96 S.Ct. 1 at 2965 n. 8; *Ford v. Strickland*, 696 F.2d at 812.

Aggravating Circumstances Considered by Judge and Jury

[5, 6] Adams argues the aggravating circumstances considered by the trial judge and jury failed to channel their sentencing discretion as required by cases such as *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). With respect to the jury's consideration, Adams contends the prosecutor's closing remarks, in which he referred to the prominence and local roots of the victim, introduced for jury consideration nonstatutory aggravating circumstances. The judge properly instructed the jury, however, that it could consider only the aggravating circumstances listed in the statute. A jury is presumed to follow jury instructions. *See Grizzell v. Wainwright*, 692 F.2d 722, 726-27 (11th Cir.1982), *cert. denied*, — U.S. ——, 103 S.Ct. 2129, 75 L.Ed.2d — (1983).

[7] In regard to the judge's consideration of aggravating circumstances, Adams faults the judge for finding the murder "especially heinous, atrocious, or cruel." In upholding the trial judge's finding, however, the Florida Supreme Court properly noted that Adams had killed his victim "by beating him past the point of submission and until his body was grossly mangled." *Adams v. State*, 341 So.2d at 769. Although Adams argues there are Florida cases with similar facts which were not held to be "especially heinous, atrocious, or cruel," it is not the role of the federal courts to make a case-by-case comparison of the facts in a given case with other decisions of the state supreme court. *Ford v. Strickland*, 696 F.2d at 819; *Spinkellink v. Wainwright*, 578 F.2d 582, 604-05, *cert. denied*, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979).

[8] Finally, Adams contends the judge's written findings reveal he considered a nonstatutory aggravating circumstance, the defendant's prior criminal record. Although it may be unclear from his findings whether the judge considered Adams' record as an aggravating circumstance or only to the extent those convictions negated the statutory mitigating circumstance of insignificant prior criminal history, it is reasonable to assume that the trial judge followed his own jury instructions and considered only statutory aggravating circumstances.

Failure to Require Resentencing When Evidence Insufficient on Some Aggravating Circumstances

On direct appeal, the Florida Supreme Court upheld the death sentence even

though it determined the evidence did not support two of the six aggravating circumstances found by the trial judge. *Adams v. State*, 341 So.2d at 769. The six aggravating circumstances relied upon by the trial judge were (1) the commission of the homicide by a person under sentence of imprisonment, Fla.Stat.Ann. § 921.141(5)(a); (2) the commission of the homicide by an individual previously convicted of a felony involving the use or threat of violence to a person, *id.* § 921.141(5)(b); (3) the commission of the homicide during the course of a robbery, *id.* § 921.141(5)(d); (4) the commission of the homicide to avoid arrest, *id.* § 921.141(5)(e); (5) the commission of the homicide for pecuniary gain, *id.* § 921.141(5)(f); and (6) the especially heinous, atrocious, or cruel nature of the homicide, *id.* § 921.141(5)(h). The Florida Supreme Court struck circumstances (4) and (5) as unsupported by the evidence.

Adams argues a death sentence cannot be constitutional when some, but not all, of the aggravating circumstances are struck, even though there are no mitigating circumstances. This argument is foreclosed by *Ford v. Strickland*, 696 F.2d 804 (11th Cir. 1983) (en banc), in which we denied constitutional relief where the Florida Supreme Court had struck three out of eight aggravating circumstances. The Florida court noted here that there were no statutory mitigating circumstances and that Adams had argued only one nonstatutory mitigating factor, his status as a human being. *Adams v. State*, 341 So.2d at 769.

Because of the United States Supreme Court's consideration of *Barclay v. Florida*, 411 So.2d 1310 (Fla.1981), *cert. granted*, —— U.S. ——, 103 S.Ct. 340, 74 L.Ed.2d 382 (1982), however, we will withhold the mandate until that case is decided.

Restriction on Consideration and Presentation of Mitigating Factors

[9] Adams alleges that, in an unrecorded conference held in chambers prior to the sentencing stage of trial, the trial judge expressly precluded him from presenting to the jury nonstatutory mitigating evidence in violation of *Eddings v. Oklahoma*, 455 U.S. 104, 110, 102 S.Ct. 869, 874, 71 L.Ed.2d 1 (1982). At the state court hearing on the motion to vacate, support counsel testified that he recalled the judge making a statement to this effect in this case, but he was not sure about the recollection because he had been involved in a number of death cases. Although he stated lead counsel had verified the recollection in a recent conversation, lead counsel did not testify at the hearing. The state court held this evidence insufficient and denied relief. The Florida Supreme Court affirmed, reasoning:

> Finally, we reject the claim that the sentencing process must be voided because of a tenuous recollection of assistant defense counsel of an unrecorded conversation with the trial judge, particularly when there was no proffer of specific nonstatutory mitigating circumstances at the original trial. We note that assistant defense counsel initially was not even certain that the conversation took place during this appellant's trial.

Adams v. State, 380 So.2d at 424. The state court's factual determination that the evidence did not support the claim is entitled to a presumption of correctness. 28 U.S.C.A. § 2254(d); *Sumner v. Mata*, 449 U.S. 539, 545–46, 101 S.Ct. 764, 768–769, 66 L.Ed.2d 722 (1981) (applying presumption of correctness to findings made by a state appellate court). This factual determination is permitted by the record. The trial judge did not expressly instruct the jury not to consider nonstatutory mitigating circumstances, and he permitted defense counsel to argue that Adams' life should be spared because he is a human being, a nonstatutory factor.

Adams argues, however, that the jury instruction implied nonstatutory mitigating factors could not be considered. Adams did not object to the instruction as required by Fla.R.Crim.P. 3.390(d).

In a case involving a virtually identical jury instruction, *Ford v. Strickland*, 696 F.2d 804 (11th Cir.1983) (en banc), we held that under *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), the

procedural default precluded review because the petitioner had not established prejudice. He had failed to show that the jury perceived it could not consider nonstatutory mitigating factors. 696 F.2d at 812–13. *Ford* disposes of Adams' argument.

The Brown Issue: Nonrecord Material Before the Florida Supreme Court

[10] Adams was one of the 123 Florida death row inmates who unsuccessfully sought relief in state court based on the Florida Supreme Court's receipt of nonrecord information in connection with the review of death cases. *Brown v. Wainwright*, 392 So.2d 1327 (Fla.), *cert. denied*, 454 U.S. 1000, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981).

His argument in the federal court is foreclosed by *Ford v. Strickland*, 696 F.2d 804 (11th Cir.1983) (en banc). Adams has no specific evidence that the Florida Supreme Court relied on nonrecord information in his case.

Arbitrary and Capricious Imposition of the Death Penalty on the Basis of Race and Geography

[11] Finally, Adams argues that the death penalty in Florida is imposed disproportionately in cases involving a white victim and in cases tried in St. Lucie County. In a motion before a state court for expert assistance in post-conviction proceedings, Adams cited statistics which arguably tended to support his claim. The statistics indicated, for example, that from 1973–1977 St. Lucie County accounted for 1.6% of the homicides statewide, but 3.2% of the death sentences, and that during this four-year period the death penalty was imposed in St. Lucie County in 17% of the cases involving white victims and none of the cases involving black victims, even though there were more than twice as many cases involving white victims. The state court denied Adams relief without affording him expert assistance.

[12] We need not decide whether the statistics provided by Adams suggest a disparate impact based on race and geography in the imposition of the death penalty in Florida. *See generally Zeisel, Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 Harv.L.Rev. 456 (1981). Disparate impact alone is insufficient to establish a violation of the fourteenth amendment. There must be a showing of an intent to discriminate. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264–65, 97 S.Ct. 555, 562–563, 50 L.Ed.2d 450 (1977); *Washington v. Davis*, 426 U.S. 229, 239, 242, 96 S.Ct. 2040, 2047, 2049, 48 L.Ed.2d 597 (1976); *Spinkellink v. Wainwright*, 578 F.2d 582, 614–15 (5th Cir.1978), *cert. denied*, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1978). Only if the evidence of disparate impact is so strong that the only permissible inference is one of intentional discrimination will it alone suffice. *See Smith v. Balkcom*, 671 F.2d 858, 859 (5th Cir. Unit B), *cert. denied*, — U.S. —, 103 S.Ct. 181, 74 L.Ed.2d 148 (1982). That is not the case here. There were only four death sentences imposed in St. Lucie County during the four-year period, so the variance in the percentage of such sentences in cases involving white and black victims is not all that revealing. *See Adams v. State*, 380 So.2d at 425; *see also Spinkellink v. Wainwright*, 578 F.2d at 612 & n. 37, 615 (citing evidence suggesting nondiscriminatory reasons for the higher death penalty rate in Florida cases involving white victims).

Adams has not proffered any evidence that the death sentence in his case is the product of intentional discrimination. The Florida statute is unquestionably neutral on its face as to race and geography. *See Spinkellink v. Wainwright*, 578 F.2d at 614. In *Spinkellink*, we rejected a similar claim of racial inequity by a Florida death row inmate who proffered statistical evidence of a disparate impact but no convincing evidence of intentional discrimination. The Court stated:

> Mere conclusory allegations, as the petition makes here, such as that the death penalty is being "administered arbitrarily and discriminatorily to punish the killing of white persons as opposed to black per-

sons" . . . would not warrant an evidentiary hearing.

Id. at 614 n. 40; *see also Smith v. Balkcom*, 671 F.2d at 860. Because Adams was not entitled to a hearing, he was not entitled to appointed experts to assist him at a hearing.

Conclusion

We have carefully reviewed all of the arguments on appeal and all of the points ruled on by the district court. The district court's denial of the writ of habeas corpus is

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 82-5595

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED

SEP 12 1983

Spencer D. Mercer
Clerk

JAMES ADAMS,

Petitioner-Appellant,

versus

LOUIE L. WAINWRIGHT,

Respondent-Appellee.

- - - - - - - - - - - - -

Appeal from the United States District Court for the

Southern District of Florida

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion July 18, 11 Cir., 198_3_ ____F.2d____).

(September 12, 1983)

Before RONEY and CLARK, Circuit Judges, and GIBSON*, Senior Circuit Judge

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

Paul H. Roney

United States Circuit Judge

*Hon. Floyd R. Gibson, U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

REHG-6
(Rev. 6/82)

CHAPTER 921

SENTENCE

PENALTY.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(1) SEPARATE PROCEEDINGS ON ISSUE OF

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon

the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) AGGRAVATING CIRCUMSTANCES.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

History.—s. 237a, ch. 19554, 1939; CGL 1940 Supp. 8661(265); s. 110, ch. 70-339; s. 1, ch. 72-72; s. 9, ch. 72-724; s. 1, ch. 74-379; s. 248, ch. 77-104; s. 1, ch. 77-174; s. 1, ch. 79-353.

Note.—Former s. 919.23.

James ADAMS, Appellant,

v.

STATE of Florida, Appellee.

No. 45450.

Supreme Court of Florida.

Dec. 16, 1976.

Rehearing Denied Feb. 14, 1977.

Defendant was convicted in the Circuit Court, St. Lucie County, Wallace Sample, J., of first-degree murder and was sentenced to death, and he appealed. The Supreme Court held that liability for second-degree felony-murder occurs only when the individual perpetrates the underlying felony as an accessory before the fact but does not personally engage in it; that the trial court did not err because its instructions on second-degree murder did not track the statute; and that, under the circumstances, the sentence of death was appropriate.

Affirmed.

Boyd, J., dissented and filed an opinion.

Hatchett, J., dissented.

1. Homicide ⇐18(1)

Under felony-murder rule, state of mind is immaterial and even accidental killing during felony is murder; malice aforethought is supplied by felony, and in this manner rule is regarded as constructive malice device. West's F.S.A. §§ 782.04, 782.04(1), (1)(a), (3).

2. Homicide ⇐18(1)

Language in second-degree felony-murder provision, "except as provided in subsection (1)," which refers to first-degree felony-murder provision, limits liability for second-degree felony-murder to occurrences when individual perpetrates underlying felony as accessory before fact but does not personally engage in it. West's F.S.A. § 782.04(1, 3).

3. Homicide ⇐18(1)

Under 1972 felony-murder statute, individual who personally kills another during perpetration or attempt to perpetrate one of enumerated felonies is guilty of first-degree murder, and in such circumstances statutory scheme does not allow for conviction of second-degree murder. West's F.S.A. § 782.04(1, 3).

4. Homicide ⇐30(1)

Liability for first-degree felony murder extends to all of perpetrator's cofelons who are personally present since, as perpetrators of underlying felony, they are principals in homicide; felony-murder rule and law of principals combines to make felon generally responsible for lethal acts of his cofelon. West's F.S.A. § 782.04.

5. **Homicide** ⇨289

Trial court, in homicide prosecution, did not err in instructing that felony-murder statute permitted liability for second-degree murder only when homicide was "not done in the perpetration of" the enumerated felonies since only if felon is accessory before fact and not personally present does liability attach under second-degree felony-murder provision; in future court approved appropriate standard jury instruction should be used rather than instruction found not erroneous in present case. West's F.S.A. § 782.04(1, 3).

6. **Homicide** ⇨354

Death penalty was appropriate punishment for defendant convicted of first-degree felony-murder where facts found by trial judge supported following aggravating circumstances: defendant committed murder while an escapee from Tennessee state prison, where he had been convicted of rape and sentenced to 99 years' imprisonment; defendant had previously been convicted of felony involving use or threat of force; defendant committed murder during course of robbery; murder was especially heinous, atrocious, and cruel; and none of statutory mitigating circumstances were shown to exist.

Richard L. Jorandby, Public Defender, Kenneth J. Scherer, Chief Asst. Public Defender, and Lois J. Frankel and Craig S. Barnard, Asst. Public Defenders, for appellant.

Robert L. Shevin, Atty. Gen., and Michael M. Corin and George R. Georgieff, Asst. Attys. Gen., for appellee.

PER CURIAM.

This cause is before us on direct appeal from a first degree murder conviction and sentence of death imposed by the trial judge. The jury recommended the death sentence. We have jurisdiction.[1]

On November 12, 1973, at approximately 10:30 a. m., the victim Edgar Brown was brutally beaten with a fire poker during the course of a robbery in his home. Brown was found shortly thereafter, fatally injured and incoherent. He died the next day.

Appellant James Adams was convicted for the murder of Edgar Brown. The evidence reflects that a witness saw Adams and Brown driving in their respective cars toward Brown's home within a few minutes of each other just before the probable time of the crime. Other witnesses located appellant's automobile at the victim's home and driving away from it, with Adams at the wheel, immediately before the wounded Brown was found. Later that day Adams left his car, a brown Rambler, with Sammy Knight, to be painted a light green. When appellant was arrested, he possessed certain money stained with blood of a type matching that of the victim, but not of himself. The denominations of the currency corresponded to the denominations Brown was known to have carried before the attack on his person. A search of Adams' car trunk upon his arrest produced jewelry taken from Brown's home and clothing stained with blood of the victim's type.

At trial Adams denied his presence at Brown's house. Adams' testimony notwithstanding, the jury found him guilty of murder in the first degree and recommended the death penalty. The trial court found that the aggravating circumstances far outweighed any mitigating ones, and on March 15, 1974, sentenced James Adams to death for the killing of Edgar Brown during the perpetration of a robbery.

The principal issue for determination concerns the trial court's instruction on second degree murder. At the conference on instructions, it was noted that the definitions of murder had been revised by the 1972 Legislature. The murder provisions read as follows:

"782.04 *Murder.*—

"(1)(a) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of

1. Art. V, § 3(b)(1), Fla.Const.

the person killed or any human being, or when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person over the age of seventeen years when such drug is proven to be the proximate cause of the death of the user, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in § 775.082.

"(b) In all cases under this section, the procedure set forth in § 921.141 shall be followed in order to determine sentence of death or life imprisonment.

"(2) When perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, or when committed in the perpetration of, or in the attempt to perpetrate, any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, except as provided in subsection (1), it shall be murder in the second degree and shall constitute a felony of the first degree, punishable by imprisonment in the state prison for life or for such term of years as may be determined by the court.

"(3) When perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate, any felony other than arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, it shall be murder in the third degree and shall constitute a felony of the second degree, punishable as provided in § 775.082, § 775.083, or § 775.084."

Specific instructions were not discussed at the conference. In actually charging the jury on second degree murder, the court used language contained in proposed instructions drafted by the Standard Jury Instructions Committee to comply with the new death penalty statute. These instructions had not been submitted to or approved by this Court. The instruction on second degree murder given by the trial judge was as follows:

> "Murder in the second degree is the killing of a human being by the perpetration of an act imminently dangerous to another and evincing a depraved mind regardless of human life, although without a premeditated design to effect the death of any particular individual, *and not done in the perpetration* of or in an attempt to perpetrate, any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb." (Emphasis added)

After retiring to deliberate, the jury requested re-instruction on the degrees of murder. At this point, both the state and appellant moved that the instructions on second degree murder be modified to "more accurately track the statute." The court denied the motions and re-read to the jury all of the original instructions.

Appellant contends that this instruction constitutes prejudicial error, asserting that the wording of the instructions on second and third degree murder bound the jury to a verdict of murder in the first degree if the jury found that Brown was killed as a part of a robbery. This limitation of the jury's options is not error. On the contrary, that result is the very goal of the first degree felony murder provision specified in Section 782.04(1)(a), Florida Statutes (1973).

[1] In its most basic form, the historic felony murder rule mechanically defines as murder any homicide committed while perpetrating or attempting a felony. It stands as an exception to the general rule that murder is homicide with the specific intent of malice aforethought. Under the felony murder rule, state of mind is imma-

terial.[2] Even an accidental killing during a felony is murder. The malice aforethought is supplied by the felony,[3] and in this manner the rule is regarded as a constructive malice device.[4]

Florida has always had some form of the felony murder rule.[5] In 1892, Florida's felony murder rule was first enacted similar to its present form.[6] First degree murder was defined to comprise not only killings done by premeditated design, but also those "committed in the perpetration of, or in the attempt to perpetrate, any arson, rape, robbery, or burglary."[7] No significant change was made in the felony murder provision until the 1972 revision.

A homicide during one of the enumerated felonies under the 1972 revision is deemed first degree murder only when it is committed by,

> " . . . a person engaged in the perpetration of, or in the attempt to perpetrate . . . "

the felony. The second degree murder provision has been modified to include a felony murder provision. It includes the unlawful killing of a person,

> " . . . when committed in the perpetration of, or in the attempt to perpetrate, any arson, rape, robbery, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, except as provided in subsection (1). . . . "

In *State v. Dixon*, 283 So.2d 1 (Fla.1973), this Court noted the difference between first degree and second degree felony murder:

> "The obvious intention of the Legislature in making this change is to resurrect the distinction between principals in the first or second degree on the one hand and accessories before the fact on the other, in determining whether a party to a violent felony resulting in murder is chargeable with murder in the first degree or murder in the second degree. . . ."

Id. at 11.

[2] We pointed out in *Dixon*, *supra*, that liability for second degree felony murder occurs when the individual perpetrates the underlying felony as an accessory before the fact but does not personally engage in it. This limited scope of the second degree felony murder provision is dictated by the provision, "except as provided in subsection (1)," which refers to Section 782.04(1), Florida Statutes (1975).[8]

[3, 4] We hold that under the 1972 homicide statute an individual who personally kills another during the perpetration or attempt to perpetrate one of the enumerated felonies is guilty of first degree murder. In such circumstances, the statutory scheme does not allow for a conviction of second degree murder. Moreover, the felon's liability for first degree murder extends to all of his co-felons who are personally present. As perpetrators of the underlying felony, they are principals in the homicide. In Florida, as in the majority of jurisdictions, the felony murder rule and the law of principals combine to make a felon generally responsible for the lethal acts of his co-fel-

2. Model Penal Code, § 201.2, Comments at 39 (Tent.Draft No. 9, 1959).

3. *See, e. g., Sloan v. State*, 70 Fla. 163, 69 So. 871 (1915).

4. Morris, *The Felon's Responsibility for the Lethal Acts of Others*, 105 U.Pa.L.R. 49, 59 (1956).

5. See Fla.Laws 1822, § 1 at 53, § 24 at 145; Fla.Laws 1824, § 11 at 208; Fla.Laws 1832, Ch. 55, § 1 at 63; and Fla.Laws 1868, Ch. 1637, Subch. 3, § 1, 2 at 63.

6. Fla.Laws 1892, Ch. 2377, 94 at 773-76.

7. Fla.Laws 1892, Ch. 2380 at 774.

8. Subsequent revision of second degree felony murder provision suggests also that perpetrator of a felony would be liable for second degree murder if during the felony there occurred a killing not committed by the felon or one of his co-felons. Thus if in resisting a felony the victim kills an innocent bystander, the felon would be susceptible to a charge of second degree murder. See Section 782.04(3), Florida Statutes (1975).

on.[9] Only if the felon is an accessory before the fact and not personally present does liability attach under the second degree murder provision of the applicable statute in the instant case.

[5] We conclude therefore that although the trial judge's instructions on second degree murder did not track the statute, under the facts of this case it did not misstate the law. If the jury believed that James Adams fatally beat Edgar Brown in the course of robbing him, Section 782.04, Florida Statutes (1973), required it to return a verdict of murder in the first degree. We find no error in the charge. Subsequent to the trial in the instant case, this Court approved an appropriate standard jury instruction under the present statute[10] and it should be the instruction used rather than the instruction found not erroneous in this cause.

Our final responsibility is to consider the appropriateness of the death sentence in order to determine independently whether the death penalty is warranted. *State v. Dixon, supra.*

[6] The facts found by the trial judge support the following aggravating circumstances: (1) Adams committed the murder while under a sentence of imprisonment, specifically while an escapee from the State of Tennessee, where he had been convicted of rape and sentenced to ninety-nine years imprisonment. (2) Adams was previously convicted of a felony involving the use or threat of force to a victim. (3) Adams committed the murder during the course of a robbery. (4) The murder was especially heinous, atrocious, and cruel, the record reflecting that he murdered his victim by beating him past the point of submission and until his body was grossly mangled. None of the statutory mitigating circumstances were shown to exist. The sole mitigating factor offered at trial was that the appellant is a human being.

We hold the sentence of death is appropriate, and affirm.

It is so ordered.

OVERTON, C. J., and ADKINS, ENGLAND, SUNDBERG and ROBERTS (Retired), JJ., concur.

BOYD, J., dissents with an opinion.

HATCHETT, J., dissents.

BOYD, Justice, dissenting.

In my opinion, the majority's attempt to distinguish first and second degree felony murder does not work for the simple reason that the distinction is not present in the statute itself. The statute provides that when death results in connection with a robbery a verdict of second degree murder may be returned. Murder "... committed in the perpetration of, or in the attempt to perpetrate, any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, except as provided in subsection (1), it shall be murder in the second degree."

The trial court specifically instructed the jury that it could not find the defendant guilty of second degree murder if it found the crime to have been committed in the perpetration of a robbery. The instruction effectively foreclosed the jury's right to find the defendant guilty of second degree murder, although it is well recognized that juries may find persons guilty of lesser included offenses in Florida under *Brown v. State*, 206 So.2d 377 (Fla.1968), and its progeny up to the recent case of *State v. Terry*, 336 So.2d 65 (Fla.1976). Furthermore, the jury was prohibited from giving a "jury pardon," a concept often recognized by this Court, e. g., *Barley v. State*, 224 So.2d 296 (Fla.1969).

In my opinion, the charge to the jury was fundamentally erroneous. No person

9. *See Pope v. State*, 84 Fla. 428, 94 So. 865 (1922). *See generally*, Note, *A Survey of Felony Murder*, 28 *Temple L.Q.* 453 (1955).

10. For jury instructions on murder appropriate under the current statute, *see Florida Standard Jury Instructions in Criminal Cases*, Homicide (2d ed. 1975).

should be executed based upon a record containing obvious reversible error, and it would certainly be improper to classify this error as harmless.

It is significant that five of the twelve jurors voted to recommend life imprisonment instead of death upon finding appellant guilty of first degree murder. Although convinced the murder occurred in the course of a robbery, they might have held out for a conviction of second degree murder had the opportunity to do so not been foreclosed by the trial court's charge.

The gory and cruel nature of the crime should not justify what I conceive to be fundamental error. Human life is too precious to be extinguished by the State without a legally proper trial.

I would reverse the judgment of the trial court and order a new trial.

James ADAMS, Appellant,

v.

STATE of Florida, Appellee.

No. 45430.

Supreme Court of Florida.

March 2, 1978.

Rehearing Denied April 7, 1978.

Following his conviction before the Circuit Court, St. Lucie County, Wallace Sample, J., defendant filed application for relief from imposition of death sentence. The

Supreme Court held that where imposition of death sentence was based in part on defendant's own testimony at sentencing hearing that he had five prior convictions, and trial court stated that it did not base its decision on any information which was not known to defendant or his counsel of record, defendant's application for relief from imposition of death sentence would be denied.

Order accordingly.

Hatchett, J., dissented.

Criminal Law ⇐1208(1)

Where imposition of death sentence was based in part on defendant's own testimony at sentencing hearing that he had five prior convictions, and trial court stated that it did not base its decision on any information which was not known to defendant or his counsel of record, defendant's application for relief from imposition of death sentence would be denied.

Richard L. Jorandby, Public Defender, Kenneth J. Scherer, Chief Asst. Public Defender, and Lois J. Frankel and Craig S. Barnard, Asst. Public Defenders, West Palm Beach, for appellant.

Robert L. Shevin, Atty. Gen., and Michael M. Corin and George R. Georgieff, Asst. Attys. Gen., Tallahassee, for appellee.

PER CURIAM.

Subsequent to the decision of the Supreme Court of the United States, in *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), this Court entered its order on May 6, 1977, establishing a procedure whereby the trial judge who imposed the death sentence was directed to file a response stating whether he imposed the sentence on the basis of consideration of any information not known to appellant. This order also provided that any application for relief pursuant to the United States Supreme Court's ruling in *Gardner v. Florida*, *supra*, should be filed with this Court within thirty (30) days after the trial judge had filed his response pursuant to this Court's directive.

On May 12, 1977, the trial court filed its response stating that in imposing the death sentence it "did not have any information whatsoever, either as listed herein or otherwise . . . which [the court] used as a basis for consideration in imposing the death sentence which was not known to the appellant and/or his counsel of record."

In his application for relief, appellant argues that he has had no opportunity to deny or explain certain factual findings relied on by the trial judge in his sentencing order. The order, which set forth specific findings of fact on which the death sentence was imposed, states in part:

> By his own admission the defendant was *previously convicted of crimes on at least five occasions* and the further undisputed evidence shows the defendant has a record involving crimes of violence.
>
> [Emphasis supplied.]

Appellant contends that he has not been convicted on five previous occasions and that the evidence before the trial court did not show that he had been convicted of prior crimes involving violence but that he had only one previous conviction for rape in Tennessee in 1962.

The admission of five previous crimes to which the trial court referred in its sentencing order was appellant's response during cross-examination. In response to the state attorney's question regarding how many times he had been convicted of a crime, appellant stated: "Maybe five or more, I don't know, something like that." (R. 926).

The Court finds this application for relief pursuant to *Gardner v. Florida* to be without merit. Appellant complains of nothing more than the use by the trial court of his testimony given at trial in sentencing the appellant. Appellant had ample opportunity to explain or refute his own testimony at trial.

It is so ordered.

OVERTON, C. J., and ADKINS, BOYD, ENGLAND and KARL, JJ., concur.

HATCHETT, J., dissents.

James ADAMS, Appellant,

v.

STATE of Florida, Appellee.

No. 58576.

Supreme Court of Florida.

Feb. 8, 1980

The Circuit Court, St. Lucie County, C. Pfeiffer Trowbridge, J., denied motion for postconviction relief, and movant appealed. The Supreme Court held that: (1) asserted issues concerning prejudicial argument and testimony could have been raised in prior direct appeal and, hence, could not support a collateral attack, and (2) fact that there were four death sentences imposed during four-year period in St. Lucie County, together with conclusions drawn therefrom, did not constitute a sufficient preliminary factual basis to establish that death penalty was imposed in arbitrary, capricious and irrational manner.

Affirmed.

1. Criminal Law ⇐99(3)

Since asserted issues concerning prejudicial argument by prosecutor and inflammatory testimony by the state could have been raised in prior appeal from conviction, such matters would not support a subsequent collateral attack by way of petition for postconviction relief. 34 West's F.S.A. Rules of Criminal Procedure, rule 3.850.

2. Criminal Law ⇐99(17)

Postconviction claim that sentencing process was required to be voided because of tainted recollection of assistant defense counsel of an unrecorded conversation with the trial judge was rejected, particularly where there was no proffer of specific nonstatutory mitigating circumstances at original capital punishment trial. 34 West's F.S.A. Rules of Criminal Procedure, rule 3.850.

3. Criminal Law ⇐641.13(7)

Defendant was not denied effective assistance of counsel at sentencing phase on ground that counsel failed to properly investigate prior conviction and failed to present testimony concerning family life and church involvement where record contained testimony of defendant's wife, girl friend and defendant himself during guilt and innocence phase which could have been used to seriously impeach any such contentions concerning defendant's character. U.S.C.A.Const. Amend. 6.

4. Criminal Law ⇐1208(1)

Fact that there were four death sentences imposed during four-year period in St. Lucie County, together with conclusions drawn therefrom, did not constitute a suffi-

cient preliminary factual basis to establish that death penalty was imposed in an arbitrary, capricious, and irrational manner. U.S.C.A.Const. Amend. 14.

Richard L. Jorandby, Public Defender, and Craig S. Barnard, Chief Asst. Public Defender, West Palm Beach, for appellant.

Jim Smith, Atty. Gen., and A. S. Johnston, Asst. Atty. Gen., Tallahassee, for appellee.

PER CURIAM.

This is an appeal from a denial of James Adams' motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850. The appellant seeks a stay of execution pending a review of that proceeding by this Court.

This Court has afforded the appellant an opportunity to fully present the issues to this Court, including oral argument. For the reasons expressed, we affirm the trial court's denial of relief and deny the stay of execution.

This Court initially affirmed the appellant's conviction and sentence of death in *Adams v. State*, 341 So.2d 765 (Fla.1976), *cert. denied*, 434 U.S. 878, 98 S.Ct. 232, 54 L.Ed.2d 158 (1977). Subsequent to this affirmance, this Court issued a *Gardner* order to the trial court, requiring the disclosure of any information used by the trial judge in sentencing which was not disclosed to appellant during the sentencing phase. The trial judge responded that no undisclosed information had been utilized in the sentencing. Appellant then petitioned for review in this Court, stating that the judge had relied upon erroneous information in sentencing, most particularly the statement by appellant himself that he had been convicted of crimes on five prior occasions. Appellant alleged that even though there had been no disclosure violation, the trial judge's reliance upon the inaccurate information violated due process standards as stated in *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), and thus entitled appellant to a new sentencing hearing. This application for relief was denied. *Adams v. State*, 355 So.2d 1205 (Fla.1978), *cert. denied*, 439 U.S. 947, 99 S.Ct. 340, 58 L.Ed.2d 338 (1978).

In the instant petition, appellant first contends that (a) there was inflammatory testimony presented by the state, and argument propounded by the prosecutor, which were prejudicial, (b) the sentencing judge relied upon the fact that the appellant had been convicted five times, and (c) the sentencing judge in an unrecorded conversation prohibited nonstatutory mitigating circumstances from being presented to the jury. We find these contentions to be without merit.

[1] The asserted issues concerning prejudicial argument and testimony could have been raised in the first appeal to this Court, and these matters thus will not support a collateral attack. *Spenkelink v. State*, 350 So.2d 85 (Fla.1977), *cert. denied*, 434 U.S. 960, 98 S.Ct. 492, 54 L.Ed.2d 320 (1977); *Sullivan v. State*, 372 So.2d 938 (Fla.1979). The issue concerning the reliance by the trial judge upon the five previous convictions testified to by the appellant was disposed of in *Adams v. State*, 355 So.2d 1205 (Fla.1978), *cert. denied*, 439 U.S. 947, 99 S.Ct. 340, 58 L.Ed.2d 338 (1978).

[2] Finally, we reject the claim that the sentencing process must be voided because of a tenuous recollection of assistant defense counsel of an unrecorded conversation with the trial judge, particularly when there was no proffer of specific nonstatutory mitigating circumstances at the original trial. We note that assistant defense counsel initially was not even certain that the conversation took place during this appellant's trial.

[3] In his second point, appellant maintains that he was denied effective assistance of counsel in the sentencing phase of his trial because his counsel failed to properly investigate his prior convictions and failed to present testimony concerning his family life and church involvement. The record contains testimony of appellant's wife, his girl friend, and the appellant himself during the guilt and innocence phase which could have been used to seriously

impeach any such contentions concerning appellant's character. The appellant testified of his playing cards and drinking for four days, including the Sunday prior to the murder. As previously stated, the appellant personally testified that he had a record of five convictions.

State and federal courts are engaged in an evolving process of determining what measure of competence shall be demanded of attorneys in criminal cases. *McMann v. Richardson*, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970). The Fifth Circuit Court of Appeals requires that counsel provide "reasonably effective assistance." *United States v. Fessel*, 531 F.2d 1275, 1278 (5th Cir. 1976). The Eighth Circuit requires "customary skills and diligence that a reasonably competent attorney would perform under similar circumstances." *United States v. Easter*, 539 F.2d 963, 966 (8th Cir. 1976). The Third Circuit demands "the exercise of the customary skill and knowledge which normally prevails at the time and place." *Moore v. United States*, 522 F.2d 730, 736 (3rd Cir. 1975). The various theories to determine ineffective assistance of counsel are discussed extensively in Tague, The Attempt to Improve Criminal Defense Representation, 15 Am.Crim.L.Rev. 109, and in *Davis v. Alabama*, 596 F.2d 1214 (5th Cir. 1979). We find that by even the most demanding standard, the appellant has not demonstrated on the record made in the trial court that there was ineffective assistance of counsel.

Further, in this proceeding the appellant has offered only conclusory statements by an assistant defense counsel as other potential mitigating evidence or as evidence which would ameliorate the factors proved in aggravation. This attorney admits he was brought into the cause only as co-counsel in a support capacity and he was not even present during the entire guilt-innocence phase of the trial. Appellant has proffered no specific evidence which he claims should have been presented in mitigation. Irrespective of his lack of any specific proffer, it is our view that the mitigating and ameliorating evidence suggested in appellant's allegations would not have affected the sentence, and was, in fact, a result negated to a large extent by the appellant's own testimony during the guilt-innocence portion of the trial.

[4] In his final point, the appellant argues that he was improperly denied an opportunity for a hearing on the issue of whether the death penalty is arbitrarily and discriminatorily applied in St. Lucie County, as evidenced by the four death sentences imposed in that county during the period 1973-1977. We find the mere fact that there were four death sentences imposed during the four-year period in St. Lucie County, together with the conclusions drawn therefrom, does not constitute sufficient preliminary factual basis to establish that the death penalty was imposed in an arbitrary, capricious and irrational manner.

The order of the trial judge is affirmed, and the motion for stay of execution of sentence is denied.

It is so ordered.

ENGLAND, C.J., and ADKINS, BOYD, OVERTON, SUNDBERG, ALDERMAN and McDONALD, JJ., concur.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

JAMES ADAMS,	)	CASE NO. 80-8041-CIV-JAG
Petitioner	)	
vs	)	
LOUIE L. WAINWRIGHT, etc.,	)	O R D E R
Respondent.	)	

THIS CAUSE has come before the Court upon a Petition for Writ of Habeas Corpus. Petitioner, James Adams, was convicted of first degree murder under Fla. Stat. § 782.04 for the unlawful killing of Edgar Brown while Petitioner was engaged in or attempting to perpetrate the felony of robbery. Petitioner was sentenced to death and, after his state remedies were exhausted, the death warrant was signed on February 8, 1980. By Order of February 9, 1980, this Court stayed the Petitioner's execution pending further Order of the Court.

Petitioner raises five grounds for relief. First, Petitioner argues that the imposition of the death penalty in this case violates the eighth and fourteenth amendments because it is based on a non-deliberate killing. Relying on the plurality opinion in Gregg v. Georgia, 428 U.S. 153 (1976), and Justice White's concurring opinion in Lockett v. Ohio, 438 U.S. 586 (1978) (plurality opinion), Petitioner asserts that the death penalty is a grossly disproportionate and excessive punishment in a case such as his, in which there was no finding of deliberateness. Assuming arguendo that the death penalty may be constitutionally imposed only in cases involving a deliberate killing, in this case the underlying felony supplies the necessary intent element.

Petitioner was convicted of the unlawful killing of a malo human being during the perpetration of a robbery. Under Florida law this constitutes first degree murder under the felony murder rule. The felony murder rule, codified in Fla. Stat. § 782.04, defines as murder any homicide committed during the perpetration of or the attempt to commit a dangerous felony, including robbery. Although

evidence of the defendant's state of mind need not be presented to prove a case of first degree murder when the felony murder rule applies, the intent to commit the crime is presumed from the underlying felony; premeditation is deemed proven by evidence of the accused's felonious conduct. Wheeler v. State, 362 So.2d 377, 379 (Fla. 1st DCA 1978), cert. denied, 440 U.S. 924 (1979); Ables v. State, 338 So.2d 1095, 1097 (Fla. 1st DCA 1976), cert. denied, 346 So.2d 1247 (Fla. 1977). As the Supreme Court of Florida stated in the earlier proceedings of this case, the felony murder rule

> stands as an exception to the general rule that murder is homicide with the specific intent of malice aforethought. Under the felony murder rule, state of mind is immaterial. Even an accidential killing during a felony is murder. The malice aforethought is supplied by the felony, and in this manner the rule is regarded as a constructive malice device.

Adams v. State, 341 So.2d 765, 767-68 (Fla.) cert. denied, 434 U.S. 878 (1977) (footnotes omitted). See, e.g., Sloan v. State, 70 Fla. 163, 69 So. 871 (1915).

Accordingly, Petitioner's contention that the death penalty is being imposed as punishment for a non-deliberate killing in this case is erroneous. The deliberateness of the act is presumed from the evidence at Petitioner's trial that the beating that resulted in the victim's death occurred during the perpetration of a robbery. The felony murder rule simply obviated the necessity of proving the defendant's state of mind. The Court, therefore, rejects Petitioner's argument that the imposition of the death penalty in this case is disproportionate to the crime and excessive, in violation of the eighth and fourteenth amendments.

Petitioner next argues that his death sentence "shocks the conscience" because the procedures used were grossly unreliable and wholly arbitrary, and did not meet the safeguards required by the

eighth and fourteenth amendments. Petitioner alleges eight points of procedural error to support this argument. The Court concludes that none of the procedural errors alleged rise to constitutional significance.

Testimony was elicited from the Petitioner on cross-examination during the guilt/innocence phase of the trial, that Petitioner had five prior convictions. Petitioner argues that this testimony was in error, and that by allowing this testimony in, the jury or the judge considered a non-statutory aggravating factor and/or relied on erroneous testimony to negate a statutory mitigating factor. The Court finds that the error, if any, was harmless and was the Petitioner's fault alone.

First, there is no conclusive evidence that the Petitioner's testimony of five prior convictions was in error. In addition, the state did not rely on this testimony in the sentencing phase of the proceedings, and the trial judge gave the jury proper instructions, tracking the language of the statute; thus, it cannot be concluded that the jury or the judge improperly relied on non-statutory aggravating circumstances. Moreover, it is apparent from the record of all the proceedings that Petitioner has at least some significant prior criminal record. Therefore, the trial judge's express finding that the statutory mitigating factor of no significant criminal history had been negated, based on the Petitioner's testimony, is supported by the record and any error was harmless.

Petitioner also points to the mugshot and fingerprints that were introduced in the sentencing phase as grounds for finding procedural error because they were not linked to any of the Petitioner's prior convictions. There was no objection to this evidence being admitted at trial, and it was submitted only for identification purposes to prove that the Petitioner was the same person who had been previously convicted of rape.

Likewise, the Petitioner's arguments that the trial court made numerous errors in his findings of fact and that he should not

have immediately sentenced the defendant are without merit. There is no constitutional requirement that the trial judge expressly find that the homicide was deliberate or that he expressly state that the aggravating circumstances were found beyond a reasonable doubt. The deliberateness of the homicide is implied from the underlying felony. Further, it can be assumed from the fact that the trial judge gave the jury proper instructions that the judge knew the law. Contrary to Petitioner's contention, the trial judge's use of the underlying felony as an aggravating circumstance in his findings of fact will not result in the death penalty being imposed in all felony murder cases; rather, the Florida death penalty statute requires the weighing of all mitigating and aggravating circumstances.

Finally, there is no prohibition against the judge sentencing the defendant immediately upon receiving the jury's advisory verdict. To the contrary, a defendant has a right to speedy sentencing. Jurrego-Cesares v. United States, 496 F.2d 190, 192 (5th Cir. 1975).

There is no reliable evidence in the record to support Petitioner's argument that the trial judge limited the parties to the presentation of statutory mitigating factors only, in violation of Lockett v. Ohio, 438 U.S. 586. The judge tracked the language of the statute in charging the jury, and did not instruct the jury not to consider other non-statutory mitigating factors. In fact, Petitioner's counsel argued at the sentencing phase that the Petitioner's life should be spared because he is a human being, a factor in mitigation not listed in the statute.

Petitioner also argues that inflammatory remarks were made by the prosecutor, and that Petitioner was thereby denied the right to a fair trial. At the guilt/innocence phase of the trial, the prosecutor commented on the fact that the victim of the rape for which Petitioner was convicted of in Tennessee was a white woman and that the Petitioner was black. Only one reference was made to this fact and it was not repeated at the sentencing phase.

At the sentencing phase, the prosecutor also pointed out that the Petitioner was not from the community and that he had killed

"one of our people", thereby appealing to the juror's community bias. While the propriety of the foregoing remarks is doubtful, they alone are not of such an inflammatory nature that it can be concluded that the Petitioner was deprived of his constitutional right to a fair trial.

Petitioner's argument that he was deprived of notice of the aggravating circumstances that the state intended to rely on was rejected in Spenkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 976(1979), in which the court held that the Florida death penalty statute alone provides sufficient notice to the defendant. Id. at 609-10.

Finally, the Petitioner argues that the Supreme Court of Florida erred in upholding the death penalty after eliminating two of the aggravating circumstances that the trial judge relied upon, and complains of the Supreme Court of Florida's mechanical imposition of the death penalty in cases in which no mitigating factors are found.

In Proffitt v. Florida, 428 U.S. 242 (1976) (plurality opinion), the Supreme Court recognized that a sentence could be upheld even though the reviewing court rejected one or more of the aggravating circumstances found by the trial court, provided that the balancing process again results in the same conclusion that the death penalty is appropriate. Id. at 250 n.8, 256 n.14. Furthermore, there is no evidence that the Supreme Court of Florida's review of death penalty cases is mechanical in nature. Instead, it is apparent from its opinions that the Supreme Court of Florida is well aware of its duty to balance all the aggravating and mitigating circumstances and make a case-by-case determination. See, e.g., Alford v. State, 307 So.2d 433 (Fla. 1975), cert. denied, 428 U.S. 912 (1976); State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974).

Petitioner's third ground for relief is that the Florida death penalty statute is unconstitutional on its face and as applied. Petitioner argues that the death penalty is arbitrarily imposed in

Florida on the basis of race, geography, and other arbitrary factors. Petitioner also argues that he was denied equal protection and the opportunity to present these claims by the trial court's refusal to grant him the funds necessary to prove his claim of arbitrary application.

In Proffitt v. Florida, 428 U.S. 242, the Supreme Court of the United States recognized that the procedure followed in Florida in capital cases, including the guidance given to the trial judge by the death penalty statute, as well as the appellate review system, minimizes any risk that the death penalty will be imposed arbitrarily or capriciously. Id. at 253.

This argument was also raised and disposed of in Spinkellink v. Wainwright, 578 F.2d 582, 604-06. The Fifth Circuit stated in Spinkellink that if a state has a properly drawn statute, such as Florida does, which the state follows in determining which defendants receive the death penalty, then the arbitrariness and capriciousness have been conclusively removed. Id. at 605. Furthermore, as a matter of comity and federalism, the sentencing process should be reserved to the state judiciary, without the federal courts unduly interfering. Id. at 606. Thus, finding nothing in the record to support allegations of arbitrary application, and noting that the procedures followed by the state courts in this case were similar in nature, it is not within the province of this Court to review substantively the sentencing decision. See Spinkellink, 578 F.2d at 614 n.40.

The Spinkellink decision also disposes of the petitioner's argument that he was denied equal protection because the trial court would not grant him the funds necessary to prove his case of arbitrary application of the death penalty. The Fifth Circuit stated that mere conclusory allegations of arbitrary administration of the death penalty statute is not sufficient to even warrant an evidentiary hearing. The Petitioner must be able to show some specific set of facts evidencing intentional or purposeful racial discrimination against him. Id. at 614 n.40. Thus, it follows that if Petitioner

has not alleged sufficient facts to require an evidentiary hearing, the trial court did not commit error in denying him the expenses to gather and present such evidence to the court.

Petitioner further argues that death by electrocution is unconstitutional because it imposes unnecessary physical and psychological torture, that the Florida death penalty statute fails to give the jury proper guidance because it specifies no standard of proof for the overall weighing process, and that the aggravating circumstances, as applied to Petitioner and in general, are unconstitutionally vague and fail to adequately channel the sentencing decision patterns of judges and juries. These same arguments have been raised and rejected in prior decisions controlling this Court. See Spinkellink v. Wainwright, 578 F.2d 582, 616 (electrocution not unconstitutional means of execution); Proffitt v. Florida, 428 U.S. 242, 254-58 (1976) (Florida statute sufficiently clear and precise in its directions to the judge and jury with regard to the aggravating and mitigating circumstances and the weighing process).

Petitioner's fourth ground for relief is that he was denied effective assistance of counsel at the sentencing phase of the proceedings. As the Fifth Circuit has stated,

> effective counsel does not mean "errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance"... This necessarily "involves an inquiry into the actual performance of counsel in conducting the defense ... based on the totality of the circumstances and the entire record."

Beavers v. Balkcom, 636 F.2d 114, 115 (5th Cir. 1981) (citations omitted). Applying this standard, and noting the acts of trial counsel that Petitioner points to as evidence of ineffective assistance of counsel, the Court finds that only one of Petitioner's allegations merits any discussion at length, to wit, that trial counsel failed to adequately investigate or present any evidence in mitigation at

the sentencing phase.

During the sentencing phase, Petitioner's counsel indicated that he had no evidence. His closing argument consisted of the following: "I find it necessary to ask for you to consider that you save [the Petitioner's] life, in spite of all this [the evidence presented by the state] and let this man live, for no other reason than that he is a man." Trial Transcript at 1175, 1180. Petitioner argues that evidence in mitigation could and should have been presented during the sentencing phase. For example, Petitioner points to his family background in rural Tennessee, his lack of education, and his active involvement in the Baptist church.

In light of the total circumstances, the Court cannot find that the failure to present this evidence constituted a failure to provide effective assistance of counsel. Trial counsel's decision not to present this evidence may well have been based on the consideration that were this evidence presented, the state may well have presented more damaging character evidence in rebuttal. For example, had the Petitioner's wife testified to his family background, the state could have brought out evidence that the Petitioner and his wife were separated because of his relationship with a sixteen-year-old girl. Even though another attorney may have presented this evidence or may have made a different tactical decision, it cannot be concluded that Petitioner's counsel was ineffective. Williams v. Estes, 354 F.2d 698, 706 (5th Cir. 1965).

Petitioner's final grounds for relief is based on the Florida Supreme Court's receipt of ex parte information concerning Petitioner in its review of his appeal. Petitioner argues that the Supreme Court's practice of requesting and receiving this information, without notice to the Petitioner, denies him due process of law, the effective assistance of counsel, the right of confrontation, and subjects him to cruel and unusual punishment and to compulsory self-incrimination, in violation of the fourteenth amendment and its incorporated guarantees.

On September 29, 1980, Petitioner, along with one hundred twenty-one other death-sentenced appellants, filed an Application for Extraordinary Relief and Petition for Writ of Habeas Corpus in the Supreme Court of Florida based on the same grounds as stated above. The Supreme Court of Florida denied relief as to all petitioners. Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). A petition for writ of certiorari was then filed in the Supreme Court of the United States. By Order of August 31, 1981, this Court stayed all proceedings in this cause pending disposition of Brown v. Wainwright in the Supreme Court of the United States. The petition for writ of certiorari was denied on November 2, 1981. Brown v. Wainwright, 50 U.S.L.W. 3369 (Nov. 2, 1981). As a result, the Court will proceed to decide this issue on the merits.

The Court notes that the issue presented here and in Brown v. Wainwright is now pending in the Eleventh Circuit Court of Appeals in the cases of Johnny Paul Witt v. Louie L. Wainwright, No. 81-5709, and Charles Kenneth Foster v. Charles G. Strickland, Jr., No. 81-5734.

Petitioner's contention is based at least in part on Gardner v. Florida, 430 U.S. 349 (1977), which prohibits the imposition of the death penalty to any extent on the basis of non-record, unchallengeable information. Id. at 362. As the Supreme Court of Florida pointed out in Brown v. Wainwright, the state Supreme Court merely reviews the death sentence; the imposition of the sentence is a function for the trial judge based on the jury's recommendation. 392 So.2d at 1332. Thus, "Gardner presents no impediment to the advertent or inadvertent receipt of some non-record information." Id.

To the extent that the Petitioner's argument is not based on Gardner, the Court notes that neither of the Supreme Court of Florida's duties in reviewing death sentences--determining that procedural regularity has been followed with regard to the judge and jury, and ensuring proportionality among death sentences imposed within the state--involves weighing or reevaluating the evidence

used to establish aggravating or mitigating circumstances. See Brown, 392 So.2d at 1331. Moreover, the Supreme Court of Florida stated in Brown that "[f]actors or information outside the record play no part in our sentence review role." Id. at 1332.

The Supreme Court of Florida in Brown also addressed the question of whether the reading of non-record documents affected the ability of members of the court to properly perform their appellate functions. As the court stated: "Plainly it would not. Just as trial judges are aware of matters they do not consider in sentencing, ... so appellate judges are cognizant of information that they disregard in the performance of their judicial tasks." Id. at 1331 (citation and footnote omitted).

Accordingly, this Court adopts the reasoning of the Supreme Court of Florida, and rejects the Petitioner's argument that the ex parte receipt of information by the Supreme Court of Florida entitles him to relief.

Based on the foregoing reasons, it is ORDERED AND ADJUDGED that the petition for writ of habeas corpus be and the same is hereby DENIED.

DONE AND ORDERED in chambers at Fort Lauderdale, Florida, this 17th day of February, 1982.

Jose A. Gonzalez, Jr.
UNITED STATES DISTRICT JUDGE

ORIGINAL

NO. 83-5701

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

JAMES ADAMS,

Petitioner,

vs.

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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TABLE OF CONTENTS

QUESTIONS PRESENTED

1. Whether the Sixth and Fourteenth Amendments permit the denial of a claim of ineffective assistance of counsel in a capital sentencing trial -- on the basis of a presumtion that counsel provided effective assistance -- where the record shows that counsel decided: (a) to present no evidence of mitigating circumstances, despite the available but univestigated evidence of very substantial mitigating circumstances; (b) to inform the jury and the court in the sentencing trial that "[w]e [the defense] have no evidence"; and (c) to present a closing argument which conceded the persuasiveness of the reasons for imposing death, provided no reasons for imposing life instead of death, and apologetically asked the sentencer to "consider imposing life despite there being no reason he could think of for doing so.

2. Whether the sentencing court's application of non-premeditated felony murder as an aggravating circumstance justifying the imposition of the death penalty conflicts with the Court's recent pronouncement in Zant v. Stephens, ___ U.S. ___, 103 S. Ct. 2733, 2747 (1983), prohibiting capital sentencing tribunals from treating as aggravating "conduct that actually should militate in favor of a lesser penalty."

3. Whether the Florida courts' procedural default rule, which is haphazardly applied in capital cases, can serve as an "independent and adequate state procedural ground" under Wainwright v. Sykes, 433 U.S. 72 (1977) and thus bar federal habeas corpus review of capital sentencing issues.

TABLE OF CITATIONS

NO. 83-5701

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

JAMES ADAMS,

Petitioner,

vs.

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Respondent, Louie L. Wainwright, by and through undersigned counsel, prays that the instant petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit filed July 18, 1983, be denied.

CITATIONS TO OPINIONS BELOW

The opinion of the court of appeals is reported at 709 F. 2d 1443 (11th Cir. 1983).

JURISDICTION

The judgment and opinion of the court of appeals was rendered on September 12, 1983. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the sixth amendment of the Constitution which provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . .to be confronted with the witnesses against him . . .and to have the assistance of counsel for his defense;

the eighth amendment to the Constitution which provides in relevant part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;

and the fourteenth amendment to the Constitution which provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

It also involves Section 921.141, Florida Statutes (1973), which is set out at App. 10a-11a.

STATEMENT OF THE CASE

The Respondent accepts the Petitioner's statement of the case for the limited purpose of the instant petition.

REASONS FOR DENYING THE WRIT

I. THE COURT SHOULD NOT GRANT CERTIORARI TO DETERMINE THE PROPER RULE OF THE PRESUMPTION OF ATTORNEY COMPETENCE IN THE ANALYSIS OF A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL IN A CAPITAL SENTENCING TRIAL BECAUSE THE ISSUE AS FRAMED WAS NOT PRESENTED BELOW.

The Petitioner is now complaining that the Eleventh Circuit's opinion rendered in the matter utilized a principle of law that attorneys are presumed to be competent. However, the Petition did not complain to the Eleventh Circuit by raising said issue in his petition for rehearing and/or suggestion for rehearing en banc (A 1). Therefore, this Court should not consider the contention now raised. E.g., United States v. Ortiz, 422 U.S. 891, 95 S. Ct. 2585, 45 L. Ed. 2d 623 (1975).

Additionally, the Respondent submits that the Petitioner has misconstrued and misinterpreted the circuit court's opinion. Rather than relying on any presumption of attorney competence, the court utilized the standard of "whether counsel's decision to make a plea for mercy, in lieu of presenting any mitigating evidence, was one of strategy taken after he reasonably investigated other plausible options." (A 2c). The Petitioner's allegation that the court presumed, "without explicitly saying so," that counsel always conduct reasonably substantial investigation of plausible defenses is nothing short of fanciful. The court's statement that "there is no basis in this record for finding that counsel did not sufficiently investigate Adams'

background" was not a presumption but, rather, a legitimate comment on the record before the court that said record shows that counsel did investigate Adams' background. Such reasoning is in line with King v. Strickland, 714 F. 2d 1481 (11th Cir. 1983), although the record in King indicated the opposite result, to wit: that there were indications that counsel failed to sufficiently conduct investigation.

Since the burden of proof to establish ineffectiveness and prejudice is on the Petitioner, the Respondent submits that logic would necessitate a presumption of competence. After all, a defendant charged with a crime has a presumption of innocence until proven guilty by his accusers. Why should an attorney who has proven himself initially competent by meeting the standards of the State bar not be accorded the presumtion of remaining competent until proven incompetent by his accusers especially since a finding of incompetence could lead to the attorney losing his license and thereby his likelihood? The Respondent respectfully requests that this Honorable Court refrain from considering an issue not raised below and one that has only become an issue by the Petitioner's strained and convoluted reading of the opinion redered below.

II. THIS COURT SHOULD NOT GRANT CERTIORARI AS THE INSTANT ISSUE WAS NOT PRESENTED BELOW AND THERE IS NO CONFLICT WITH THE LOWER COURT'S OPINION AND ZANT V. STEPHENS.

When all is said and done, the fact of the matter is that the instant issue was not raised below (Petition, p. 9 n.4) and, therefore, is not properly raised herein.

In the court below, the Petitioner argued that his death sentence was disproportionate and excessive because it was based on felony murder without a specific finding of intent to kill. Zant v. Stephens, ___ U.S. ___, 103 S. Ct. ___, 77 L. Ed. 2d 235 (1983) dealt with the issue of whether a death sentence must be invalidated due to the failure of one aggravating circumstance when the death sentence is adequately supported by other aggravating circumstances. The Petitioner has taken isolated statements from Zant in an illogical attempt to show conflict between the instant opinion and Zant, supra. A fair reading of both opinions, paying attention to the issues involved in each, however, reveals that any conflict has been imagined by the Petitioner. In fact, the Respondent submits that the instant case falls within the ambit of Zant.

The function of statutory aggravating circumstances is to circumscribe the class of persons eligible for the death penalty. Zant, supra, 77 L. Ed. 2d at 250-251. The Florida legislature, in enacting section 921.141(5)(d), Florida Statutes (1973), defined, in part, the type of murder for which the death penalty may be imposed to be a murder committed while the defendant was engaged in certain enumerated felonies. The legislature, therefore, in its wisdom categorically narrowed

the types of murders to include murders committed during certain felonies as an effective deterent. See, Gregg v. Georgia, 428 U.S. 153, 184, 96 S. Ct. 2902, 49 L. Ed. 2d 859 (1976). The aggravating circumstance herein contested in a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. It cannot be said that the aggravating circumstance is too vague and nonspecific to be applied evenhandly by the sentencer. The Florida legislature has deemed felony murder to be deserving of death, contrary to the Petitioner's unsupported contention that in Florida felony murder is less deserving of death.

Since there is no conflict and the issue as framed was not presented below, the Respondent respectfully requests that this Court deny certiorari to entertain the issue.

III. THE COURT SHOULD NOT GRANT CERTIORARI AS FLORIDA DOES NOT HAPHAZARDLY APPLY THE PROCEDURAL DEFAULT RULE SO THAT FEDERAL HABEAS CORPUS REVIEW CAN BE BARRED.

A review of the cases cited by the Petitioner shows that the instant issue is wholly without merit. In Straight v. Wainwright, 422 So. 2d 827 (Fla. 1982), the procedural default rules was not even at issue as trial counsel obviously objected at trial to the limitation of consideration to statutory mitigating circumstance. It is beyond comprehension how the

Petitioner can interpret Straight to be a case in which the Florida Supreme Court declined to follow the procedural default rule. Since the court did not discuss trial counsel's failure to object at trial, the only logical and reasonable explanation is that the issue was properly preserved for appellate review. Accord, Douglas v. State, 373 So. 2d 895 (Fla. 1979); Demps v. State, 416 So. 2d 808 (Fla. 1982); Ruffin v. State, 420 So. 2d 591 (Fla. 1982); Hall v. State, 420 So. 2d 872 (Fla. 1982).

In Demps, Ruffin, and Hall, the supreme court did decline to entertain certain issues raised in the motions to vacate because they were either raised on direct appeal or could have been raised there. The Respondent submits that in refusing to entertain said issues, the court was following the procedural default rule.

Since the Petitioner has made a barebones allegation, totally unsupported by Florida case law, the Respondent respectfully requests that this Court deny certiorari to entertain the issue.

CONCLUSION

For the reasons expressed herein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JIM SMITH
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Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response To Petition For Writ of Certiorari To The United States Court Of Appeals For The Eleventh Circuit has been furnished to RICHARD H. BURR, III, ESQUIRE, Assistant Public Defender, Attorney For Appellant, 224 Datura Street, 13th Floor, West Palm Beach, Florida 33401 by mail/courier delivery this 30th day of November, 1983.

OF COUNSEL

NO. 83-5701

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

JAMES ADAMS,

Petitioner,

vs.

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections,

Respondent.

A P P E N D I X

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 82-5595

JAMES ADAMS,

Petitioner/Appellant,

v.

LOUIE L. WAINWRIGHT, Secretary
Florida Department of Corrections,

Respondent/Appellee.

On Appeal from the United States District Court
For the Southern District Court

PETITION FOR REHEARING AND/OR SUGGESTION FOR REHEARING EN BANC

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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Attorneys for Petitioner/Appellant

STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the Supreme Court of the United States and the precedent of this Circuit and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court: Godfrey v. Georgia, 446 U.S. 420 (1980); Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982), opinion modified and rehearing denied 706 F.2d 311 (11th Cir. 1983); Zant v. Stephens, __ U.S. __, 51 U.S.L.W. 4891 (June 22, 1983) (No. 82-89).

I also express a belief, based on a reasoned and studied professional judment, that this appeal involves the following questions of exceptional importance:

1. The panel's avoidance of a substantial question concerning the applicability of Wainwright v. Sykes to penalty issues in Florida death cases is a precedent-setting issue of great importance.

2. The panel's application of the same standard for determining whether a petitioner is entitled to an evidentiary hearing on a constitutional claim to a determination whether an indigent petitioner is entitled to funded expert assistance is a presendent-setting issue of great importance.

Assistant Public Defender
Attorney of Record for James Adams

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AUTHORITIES CITED

CASES CITED

STATEMENT OF THE ISSUES

A. ISSUES FOR REHEARING

1. Whether the panel opinion improperly characterizes a crucial state court conclusion of law as a finding of fact and thereby avoids the resolution of a direct violation of Lockett v. Ohio.

2. Whether the panel's decision erroneously holds that the failure to investigate the constitutional invalidity of prior out-of-state convictions can be treated as harmless error, since that doctrine may only be invoked where aggravating factors are invalid on state grounds under Barclay v. Florida.

B. ISSUES FOR REHEARING EN BANC

3. Whether the panel opinion's approval of the felony murder aggravating circumstance in this case directly conflicts with recent Supreme Court pronouncements concerning the necessary function of a statutory aggravating circumstance.

4. Whether the panel opinion is in direct conflict with Proffitt v. Wainwright and Godfrey v. Georgia in holding that this Court cannot entertain a challenge to the Florida Supreme Court's unprincipled application of a statutory aggravating circumstance in a particular case.

5. Whether the court's avoidance of a substantial question concerning the applicability of Wainwright v. Sykes to penalty issues in Florida death cases is a precedent-setting error of exceptional importance.

6. Whether the panel incorrectly applies the same standard for determining whether a petitioner is entitled to an evidentiary hearing on a constitutional claim to a determination whether an indigent petitioner is entitled to funded expert assistance, and thus presents a precedent-setting issue of exceptional importance.

STATEMENT OF PROCEEDINGS

Petitioner was sentenced to death on March 15, 1974. His conviction and death sentence were affirmed by the Florida Supreme Court[1] and the United States Supreme Court denied his petition for writ of certioari.[2] Petitioner moved for post-conviction relief on November 1, 1979.[3] Denial of that motion after an evideniary hearing was affirmed by the Florida Supreme Court,[4] and clemency was subsequently denied.

Upon his application for habeas corpus to the District Court for the Southern District of Florida, execution of a death warrant was stayed. The petition was denied by the District Court on February 17, 1982, and an appeal taken to this Court. The cause was orally arqued on March 1, 1982, and on July 18, 1983, the panel issued its opinion affirming the District Court's decision.

STATEMENT OF THE FACTS

The evidence at trial showed that on the morning of November 12, 1973, Edgar Brown was found injured in his room (T 441).[5] Apparently the perpetrator had entered the residence unarmed while no one was in the house (T 267, 324-325, 442-446). Sometime later, the deceased return home and discovered the perpetrator. There was a struggle, during which the deceased received injuries from a fireplace poker kept in the house. He died the next day. Premeditation was not an issue in this prosecution (T 1050).

[1] Adams v. State, 341 So.2d 765 (Fla. 1976)

[2] Adams v. Florida, 434 U.S. 878 (1977)

[3] In the interim, Petitioner's Gardner v. Florida, 430 U.S. 349 (1977) claim was decided adversely to him by the Florida Supreme Court, Adams v. State, 355 So.2d 1205 (Fla. 1978), cert. den. Adams v. Florida, 439 U.S. 947 (1978), reh. den. 440 U.S. 931 (1979).

[4] Adams v. State, 380 So.2d 423 (Fla. 1980)

[5] The following abbreviations are used: "T" = Trial transcript; "PCT" = Transcript of hearing on motion for post-conviction relief.

At the penalty phase of the trial, the State adduced evidence that Mr. Adams had been convicted of rape in 1963 in Tennessee, and was sentenced to ninety-nine (99) years in prison for that charge. At the hearing on Petitioner's motion for post-conviction relief, Mr. Wilkenson, an attorney who assisted trial counsel at the trial and then prepared the clemency, testified that Mr. Adams' rape trial was before a jury which may well have been the product of racially selective procedures. All the jurors were white, and the courtroom was racially segregated: Mr. Adams' family had to sit in the balcony. Mr. Adams himself was shackled throughout the trial, although there was no indication he acted in a way which would have justified such a prejudicial treatment, which was apparently standard procedure (PCT 20-21). Moreover, although Mr. Adams had testified at trial in response to the State's cross-examination that he had "five or more" convictions (T 926), Mr. Wilkenson readily discovered that only the 1962 rape conviction was legal (PCT 15,16). Two other misdemeanor convictions—all that there was record on—had been uncounselled and there had not been an offer of counsel.

ARGUMENTS AND AUTHORITIES

1. THE PANEL OPINION IMPROPERLY CHARACTERIZES A CRITICAL STATE COURT CONCLUSION OF LAW AS A FINDING OF FACT AND THEREBY AVOIDS THE RESOLUTION OF A DIRECT VIOLATION OF LOCKETT V. OHIO.

Mr. Adams argued that the sentencing judge expressly precluded the presentation of evidence of nonstatutory mitigating circumstances in violation of Lockett v. Ohio, supra, where prior to the sentencing phase of his trial, the judge held an off-the-record conference in chambers in which he said that he would admit only evidence of statutory aggravating and mitigating circumstances. Pet. Br., 50-53; Pet. Reply Br., 19-21. The Florida Supreme Court found the uncontradicted testimony of one of the trial lawyers establishing

this claim legally insufficient.

> "[W]e reject the claim that the sentencing process must be voided because of a tenuous recollection of assistant defense counsel[6] of an unrecorded conversation where there was no proffer of specific nonstatutory mitigating circumstances at the original trial."[7]

Adams v. State, 380 So.2d 423, 424 (Fla. 1980). Mr. Adams argued that this was a legal conclusion concerning the sufficiency of the evidence to establish the claim (not the facts) as a matter of state law, and accordingly, was not a fact finding to which the Court could defer under 28 U.S.C. §2254(d). Nevertheless, the panel treated this conclusion as a finding of fact ("[t]he state court's factual determination that the evidence did not support the claim is entitled to a presumption of correctness"), Panel Opinion, 4068, and swept the issue aside.

Mr. Adams submits that the panel fundamentally erred when it characterized the Florida Supreme Court's conclusion as a finding of fact. The state court's "finding" was instead a conclusion of state law, to which no deference should have been given. See, Sumner v. Mata, 455 U.S. 591, 597 (1982). The legal sufficiency of facts in this context, is always a federal question which must be determined independent of state-law-based conclusions. Once the "finding" by the Florida Supreme Court is properly characterized, it is clear that federal law compels precisely the

[6] As the panel appeared to recognize, defense counsel's recollection was not "tenuous." He testified that he recalled the conference, but that at first he was not certain whether it had occurred in Mr. Adams' or another client's trial. He confirmed (before testifying) with his co-counsel that this conference had occurred in Mr. Adams' trial. (PCT 14)

[7] The absence of a proffer is no indication that the judge did not so limit the presentation of mitigating evidence, however. At the time of Mr. Adams' trial (1974), the reasonable understanding in Florida was that the law properly required such a limitation. See, Proffitt v. Wainwright, supra, 685 F.2d at 1248 and n. 30; Foster v. Strickland, 707 F.2d 1339, 1347 (11th Cir. 1983).

opposite result from that reached by the Florida Supreme Court: Mr. Adams' established a serious violation of Lockett.[8]

Because the panel's erroneous procedural resolution of this issue precluded review of a clear Lockett violation, rehearing must be granted in order to avoid grave unfairness to Mr. Adams.

2. THE PANEL'S DECISION ERRONEOUSLY HOLDS THAT THE FAILURE TO INVESTIGATE THE CONSTITUTIONAL INVALIDITY OF PRIOR OUT-OF-STATE CONVICTIONS CAN BE TREATED AS HARMLESS ERROR, SINCE THAT DOCTRINE MAY ONLY BE INVOKED WHERE AGGRAVATING FACTORS ARE INVALID ON STATE GROUNDS UNDER BARCLAY V. FLORIDA.

The panel decision relied for its finding that Mr. Adams was not entitled to relief on his claim of ineffective assistance of counsel on an erroneous assumption that the record established adequate investigation by defense counsel into mitigating evidence. In actuality, the trial court effectively found that there was no investigation into critical matters of mitigation which could only be proven by recourse to witnesses who resided out-of-state. Thus, the trial court specifically grounded its denial of post-conviction relief on the following:

> "There is this problem about investigation; we heard that Mr. Wilkenson [assistant defense counsel] went all the way up to Tennessee and

[8] In his reply brief, at 19-21, Mr. Adams set forth the proper context in which to analyze this claim—as a claim of prejudice resulting from the non-recording of critical portions of his trial. While that analysis is sufficient, there is further corroboration that the trial judge indeed expressly limited the presentation of mitigating evidence. The trial judge gave the standard instruction concerning the scope of mitigating circumstances which could be considered—the very same instruction which the Court in Foster v. Strickland, 707 F.2d 1339, 1346-1347 (11th Cir. 1983) held to have limited the consideration of mitigating circumstances to those listed in the statute. Since, as the panel here observed, "it is reasonable to assume that the trial judge followed his own jury instruction," at 4067, this is still further confirmation that the judge believed that only statutory mitigating circumstances could be considered, and that he could well have made the non-record order at issue.

> researched the records and talked to lawyers and clerks and people up there. I know that what he was doing was acting sort of out of desperation in an attempt to salvage this case for [clemency], but whether trial counsel in an ordinary first degree capital case is obligated to travel all over the United States to investigate validity of convictions is something else. I'm not certain that he's required to do that." PCT 117-118, emphasis added.

Thus, the trial court did not find that defense counsel had exercised a strategic judgment, he found that there was no investigation because no investigation was required. Moreover, the attacks on Petitioner's prior convictions, which the panel agreed were used as aggravating circumstances to weigh in the life-death decision, were directed toward their constitutional invalidity. In Barclay v. Florida, ___U.S.___, 51 U.S.L.W. 5206 (July 6, 1983), the Supreme Court held, in a plurality opinion by Justice Rehnquist, that Florida's harmless error rule announced in Elledge v. State, 346 So.2d 998 (Fla. 1977), was not constitutionally objectionable, where the basis for rejecting aggravating factors found to exist by the trial court was grounded on impropriety as a matter of state law. But a different result must occur where, as here, constitutionally impermissible factors were considered in support of the imposition of a defendant's death sentence. Any consideration of constitutionally impermissible factors to justify a death sentence, then, represents error of constitutional magnitude which cannot be deemed harmless. See, Barclay v. Florida, 51 U.S.L.W. 5209-5210.

Defense counsel's failure to challenge the constitutional validity of Mr. Adams' three (3) previous convictions, including the rape conviction utilized as an aggravating circumstance, can thus in no wise be construed as harmless, since that failure fatally

infected the validity of Mr. Adams' death sentence.

Since the analysis of Barclay v. Florida herein made was not possible until that case was decided, which only recently occurred, it is respectfully suggested that rehearing be granted to avoid conflict with Barclay and the principles enunciated therein.

3. THE PANEL OPINION'S APPROVAL OF THE FELONY MURDER AGGRAVATING CIRCUMSTANCE IN THIS CASE DIRECTLY CONFLICTS WITH RECENT SUPREME COURT PRONOUNCEMENTS CONCERNING THE NECESSARY FUNCTION OF STATUTORY AGGRAVATING CIRCUMSTANCE.

As the panel correctly recognized, Mr. Adams was indicted for and convicted only of felony murder. Panel Opinion, 4065. Under these circumstances, the sentencing court's subsequent reliance on the felony murder as an aggravating circumstance unconstitutionally permitted the sentencer to sentence Mr. Adams to death. In Zant v. Stephens, ___U.S.___, 51 U.S.L.W. 4891 (June 22, 1983) (No. 81-89), the Supreme Court held that

> "each statutory aggravating circumstance must satisfy a constitutional standard derived from the principles of Furman itself....[The] aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder."

Id. at 4894-4895 (emphasis supplied) (footnote and citation omitted). The panel opinion failed to apply this "constitutional standard" in rejecting Mr. Adams' challenge to the sentencing court's reliance on felony murder as a statutory aggravating circumstance.

Rather than applying this standard, the panel relied upon the Supreme Court's prior approval in Proffitt v. Florida, 428 U.S. 242 (1976), of the Florida death penalty statute, "including necessarily the use of this aggravating factor." Panel Opinion, 4066. Zant makes clear, however, that the facial validity established by

Proffitt is not enough. In application, the circumstance must "genuinely narrow the class of persons eligible for the death penalty" and "must reasonably justify the imposition of a more severe sentence on the defendant" in relation to others also found guilty.

The felony murder aggravating circumstance does not and cannot meet this standard in a case such as Mr. Adams'—where the conviction itself is based solely upon the felony murder. The finding of this circumstance in such a case does not "genuinely narrow" the class of persons thereby eligible for death. To be sure, it separates those convicted of felony murder from those convicted of premeditated murder. But it does not draw from the overall class of convicted murderers a narrower set of people whose murders are genuinely and rationally "more aggravated" than the others.

Further, the finding of this aggravating circumstance in a case such as Mr. Adams' does not "reasonably justify" imposition of death on Mr. Adams compared to persons convicted of premeditated murder. In Florida, quite to the contrary, those convicted of felony, as opposed to premeditated murder, have been deemed less deserving of death. See, McCaskill v. State, 344 So.2d 1276, 1280 (Fla. 1977). Indeed, the Supreme Court itself has generally held that murders committed by those who did not possess "a conscious purpose of producing death," Lockett v. Ohio, 438 U.S. 586 (1978) (White, J., concurring in the judgment); see, Enmund v. Florida, ___U.S.___, 73 L.Ed.2d 1140 (1982), are less, rather than more, deserving of death. Accordingly, a person convicted solely of felony murder, while actually and legally less deserving of death, is mechanically made more deserving of death by the very fact of his conviction. Surely the requirement that a statutory aggravating

circumstance "reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder" cannot be satisfied by such anomalous results.

Consequently, rehearing en banc should be granted to resolve the conflict between the panel opinion and Zant concerning the constitutional validity of a death sentence based upon a statutory aggravating circumstance which violates the mandate of Furman

4. THE PANEL OPINION IS IN DIRECT CONFLICT WITH PROFFITT V. WAINWRIGHT AND GODFREY V. GEORGIA IN HOLDING THAT THIS COURT CANNOT ENTERTAIN A CHALLENGE TO THE FLORIDA SUPREME COURT'S UNPRINCIPLED APPLICATION OF A STATUTORY AGGRAVATING CIRCUMSTANCE IN A PARTICULAR CASE.

Mr. Adams argued on appeal that the "especially heinous, atrocious or cruel" statutory aggravating circumstance was applied in his case in violation of the principles of Godfrey v. Georgia, 446 U.S. 420 (1980). He framed this issue as follows:

> "Consistent with Godfrey, the Florida Supreme Court has accorded a limited construction to the 'heinous, atrocious, or cruel' circumstance. However, in violation of Godfrey, that limited construction was not applied in Mr. Adams' case."

Pet. Br., 36. By citation to Florida Supreme Court cases, he then demonstrated that the limited construction of this circumstance made it inapplicable to the facts of his case. Pet. Br., 36-37; Pet. Reply Br., 12-13. Through such an analysis, Mr. Adams demonstrated precisely the same violation of Godfrey that this Court had found in Proffitt v. Wainwright, 685 F.2d 1227, 1261-1265 (11th Cir. 1982), opinion modified and reh. denied, 706 F.2d 311 (11th Cir. 1983). However, the panel in Mr. Adams' case refused to address this issue as presented.

Instead of treating this issue as framed, the panel simply avoided it by recasting the issue as follows:

> "Although Adams aruges there are Florida cases with similar facts which were not held to be 'especially heinous, atrocious, or cruel,' it is not the rule of the federal courts to make a case-by-case comparison of the facts in a given case with other decisions of the state supreme court."

Panel Opinion, 4066. As the briefs for Mr. Adams made clear, however, he was not simply arguing inconsistency on the part of the Florida Supreme Court, as the panel opinion implies. He was arguing that the Florida Supreme Court permitted the unprincipled application of a statutory aggravating circumstance in his case, which thus deprived him of the critical "narrowing" function of such a circumstance. As Zant has reaffirmed, supra, the federal courts do have the role of preventing such unprincipled applications of statutory aggravating circumstances.

Accordingly, the panel opinion's treatment of this issue conflicts both with this Court's prior decision in Proffitt and with the Supreme Court's decision in Godfrey, as recently reaffirmed in Zant. In light of Zant, there can be no more serious deviation from mandatory constitutional principles in the context of a death penalty case.

5. THE COURT'S AVOIDANCE OF A SUBSTANTIAL QUESTION CONCERNING THE APPLICABILITY OF WAINWRIGHT V. SYKES TO PENALTY ISSUES IN FLORIDA DEATH CASES IS A PRECEDENT-SETTING ERROR OF EXCEPTIONAL IMPORTANCE.

One of the issues raised by Mr. Adams was one common to many other Florida death cases: whether the penalty phase instructions to the jury had the effect of precluding the jury's consideration of nonstatutory mitigating circumstances. Also in common with other capital petitioners, Mr. Adams had not objected to this instruction at trial and had not raised the issue on direct appeal. Following the issuance of Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983)

(en banc), in which the Court applied Wainwright v. Sykes, 433 U.S. 72 (1977), to bar review of this same claim for the petitioner's procedural default, counsel for Mr. Adams extensively researched the Florida Supreme Court's death penalty decisions and determined that the Florida court did not adhere consistently to a procedural default rule respecting capital sentencing issues. Mr. Adams presented this research to the panel in a supplemental brief and requested leave to file it. No order was entered with respect to this request, however, and the panel opinion ignored the brief, finding Mr. Adams' procedural default to have barred review of the issue. Panel Opinion, 4068.

This question simply cannot be ignored any more. It is indisputable that Wainwright v. Sykes can bar otherwise meritorious claims. Accordingly, the proper application of the Sykes holding can literally be a matter of life or death for capital habeas corpus petitioners. If there is a question whether the Sykes doctrine applies at all to the penalty issues raised by Florida petitioners, it must be faced and resolved squarely.

Mr. Adams has attempted to show that there is very substantial question whether the Sykes doctrine applies at all to capital sentencing issues raised by Florida petitioners. In his supplemental brief, he has documented extensively the Florida Supreme Court's starkly inconsistent invocation of its own procedural default rules concerning capital sentencing issues. There can only be two conclusions drawn from this pattern: (1) there is no procedural default rule for such issues, or (2) if there is one, it is applied arbitrarily. In either case, Sykes would be inapplicable. If the state court routinely reaches the merits of issues—despite a seemingly applicable procedural default rule—

Sykes does not apply. County Court of Ulster County v. Allen, 442 U.S. 140, 147-154 (1979). And if the state court arbitrarily applies its procedural default rule in some but not all cases presenting the same defaults, there is authority for the proposition that such a practice cannot bar subsequent federal review of federal claims which the state court has thus held forfeited. See, Barr v. City of Columbia, 378 U.S. 146, 149-150 (1964); Shuttlesworth v. City of Birmingham, 376 U.S. 339 (1964) (per curiam); N.A.A.C.P. v. Alabama ex rel. Patterson, 357 U.S. 449, 456-458 (1958). Cf., Bass v. Estelle, 705 F.2d 121 (5th Cir. 1983).

Accordingly, this is an issue which demands resolution before the Court proceeds any further down the road of refusing to review otherwise meritorious claims for procedural default.

6. THE PANEL INCORRECTLY APPLIES THE SAME STANDARD FOR DETERMINING WHETHER A PETITIONER IS ENTITLED TO AN EVIDENTIARY HEARING ON A CONSTITUTIONAL CLAIM TO A DETERMINATION WHETHER AN INDIGENT PETITIONER IS ENTITLED TO FUNDED EXPERT ASSISTANCE, AND THUS PRESENTS A PRECEDENT-SETTING ISSUE OF EXCEPTIONAL IMPORTANCE.

In its opinion, the panel applied the same standard to be met by an indigent petitioner seeking funds for expert assistance to investigate and establish disproportionate application of the death penalty based on the race of the victim as would be applied to determine if the petitioner is entitled to an evidentiary hearing on his disproportionality claim. But utilization of this standard at the initial time when the request for funds to obtain expert assistance puts the cart before the horse: without the expert's data, an indigent petitioner will never be able to show the need for an evidentiary hearing so he would, ipso facto, never be able to show that he needs experts. A defendant with funds to retain his own experts, on the other hand, could readily establish the

necessary predicate and receive an evidentiary hearing on the issue.

Such financial discrimination between indigent criminal defendants and those who possess the means to protect their rights cannot be tolerated. See, e.g., Griffin v. Illinois, 351 U.S. 12 (1956) (right to trial transcript); Argersinger v. Hamlin, 407 U.S. U.S. 25 (1972); Bounds v. Smith, 430 U.S. 817 (1977) (right of prisoners to access to law libraries or professional assistance in habeas corpus proceedings). In Westbrook v. Zant, 704 F.2d 1487 (11th Cir. 1983), this Court itself recognized that where a defendant has the right to present mitigating evidence, the state has a coextensive affirmative duty to provide the funds necessary for production of the evidence. Id. at 1496. "The cost of protecting a constitutional right cannot justify its denial." Bounds v. Smith, 430 U.S. at 825, 97 S.Ct. at 1496.

Under what test is a claim for financial assistance to be assessed? In federal criminal proceedings, 18 U.S.C. §3006A(e)(1) authorizes the provision of "expert...services necessary to an adequate defense" upon a showing "that the services are necessary." The uniform interpretation of this statute by the Courts of Appeals is that the showing "that the services are necessary" is sufficiently made

> "...when the defense attorney makes a timely request in circumstances in which a reasonable attorney would engage such services for a client having the independent financial means to pay for them."

United States v. Bass, 477 F.2d 723, 725 (9th Cir. 1973). See, also, Williams v. Martin, 618 F.2d 1021, 1025-1026 (4th Cir. 1980); United States v. Durant, 545 F.2d 823, 826-827 (2nd Cir. 1976); Brinkley v. United States, 498 F.2d 1137, 1143 (8th Cir. 1974);

United States v. Chavis, 476 F.2d 1137, 1143 (D.C. Cir. 1973); United States v. Tate, 476 F.2d 131 (6th Cir. 1969).

Mr. Adams met this test, and under the federal rule, he should have been provided the expert assistance requested. Moreover, since the federal rule was enacted "to implement the sixth amendment guarantee of the assistance of counsel," Proffitt v. United States, 582 F.2d 854, 857 (4th Cir. 1978) [citing 110 Cong. Rec. 445, 18521 (1964); 109 Cong. Rec. 14223 (1963)], the standard should be articulated for and applied to habeas corpus proceedings. See, Section 3006A(g) and 28 U.S.C. §2254. Because this issue is one which is of fundamental importance to all indigents called upon to defend themselves against criminal prosecution who desire to constitutionally challenge the validity of the proceedings against them, and because of the effect of the application of a single, stringent standard to determine an indigent's rights both after and before he has the opportunity to obtain evidence to meet that standard, the instant case presents a precedent setting issue of exceptional importance, so that en banc review is called for.

CONCLUSION

Petitioner respectfully suggests that this case meets every conceivable standard for rehearing and en banc rehearing. The panel clearly overlooked or misapprehended two issues, necessitating rehearing. Moreover, two of the en banc issues are clearly of exceptional importance, and the conflict between controlling precedent in this Circuit and the other two en banc issues could not be more apparent. The need for a fair and just resolution of these issues cannot be overstated, for James Adams' life literally hangs in the balance.

For the reasons stated herein, the petition for rehearing and suggestion for rehearing en banc should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to ROBERT L. BOGEN, Assistant Attorney General, 111 Georgia Avenue, West Palm Beach, Florida, by courier/mail, this 5th day of AUGUST, 1983.

Of Counsel

No. 83-5701

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

JAMES ADAMS,
Petitioner,

vs.

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

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REPLY BRIEF

Petitioner, JAMES ADAMS, submits the following reply brief addressed to arguments first raised in the respondent's brief in opposition to the petition for writ of certiorari herein:

1. The first reason which Mr. Adams has tendered for granting certiorari in his case is

> TO DETERMINE THE PROPER ROLE OF THE PRESUMPTION OF ATTORNEY COMPETENCE IN THE ANALYSIS OF A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL IN A CAPITAL SENTENCING TRIAL, BECAUSE THAT PRESUMPTION IS BEING UTILIZED TO DENY CLAIMS OF INEFFECTIVE ASSISTANCE -- EVEN THOUGH DEFENSE COUNSEL PRESENTED NO MITIGATING EVIDENCE (DESPITE THE AVAILABILITY OF SUBSTANTIAL MITIGATING EVIDENCE) AND ARGUED IN EFFECT THAT DEATH WAS APPROPRIATE -- SOLELY FOR THE REASON THAT FORMER DEFENSE COUNSEL HAS NOT (OR WILL NOT) ADMIT A FAILURE TO INVESTIGATE OR OTHER DEFAULT IN HIS DUTY OF REPRESENTATION.

The brief in opposition has raised two arguments against granting certiorari for this reason which must be addressed.

(a) The brief in opposition asserts that petitioner did not present his argument concerning the presumption of attorney competence to the Eleventh Circuit. Accordingly, respondent argues, the Court should not now consider the merits of this argument. Respondent's position is flatly wrong, however. The argument respecting the role of this presumption in the analysis of a claim of ineffective assistance was presented

to the Eleventh Circuit in the briefs of the parties. In the briefs, respondent himself repeatedly relied on a presumption of attorney competence which, he argued, Mr. Adams' proof failed to rebut. At pages 7-8 of his reply brief, a copy of which is attached hereto as Appendix A, Mr. Adams responded to this argument and made clear to the court his position that there should be no presumption of attorney competence. He concluded,

> In short, there is not, as the State appears to believe, any presumption that a trial attorney's deficiencies are always the result of strategic considerations, rather than ignorance. Instead, that a legitimate basis for counsel's action and/or inaction exists is a matter which it is incumbent upon the State to show. Conversely, it cannot conceivably be the duty of a defendant to call a witness in order to elicit adverse and self-serving statements which the defendant disputes but is precluded from testing through cross-examination. Our adversary system of justice simply does not allow for such a Catch 22 situation. Consequently, Mr. Adams has established the ineffectiveness of the representation afforded him by trial counsel, and the State has totally failed to rebut this showing in any way, either below or before this Court.

Having presented this argument to the Court in his briefs, Mr. Adams was in no way obliged -- nor could he properly -- reargue the argument in his petition for rehearing when the court had so clearly rejected the argument in its analysis of his ineffective assistance claim. Nothing more could have been done to have presented the issue to the Eleventh Circuit.

(b) While Mr. Adams has urged the Court to grant certiorari on the presumption of attorney competence question because of conflicts among the circuits concerning the question, as well as its exceptional importance, he has not presented to the Court why the question must be resolved against any presumption of attorney competence in the event certiorari is granted. The respondent, nonetheless, has begun to address the merits, arguing that "logic would necessitate a presumption of competence." In brief reply, Mr. Adams submits that "logic" necessitates precisely the opposite -- that there be no such presumption indulged -- for the reasons articulated by Judge Arnold in his dissent in Stanley v. Zant, 697 F.2d 955, 974-975 (11th Cir.

1983), cert. pending, No. 82-7003, when he explained why there should be no presumption that trial counsel's actions were undertaken for tactical reasons:

> The question of trial counsel's strategy, or lack of it, is quite different. The lawyer himself is obviously the best witness on that subject, in many cases the only witness, but he is now in an adversary position vis-a-vis his former client. He may be unwilling to cooperate with present counsel. The very point of the proceeding is to challenge his professional conduct. He is much more likely to cooperate and consult with counsel for the State, whose object at the hearing will be to vindicate his conduct. It makes more sense, it seems to me, to put the burden of proof on the State, once a petitioner demonstrates some omission serious on its face, to call trial counsel as a witness to explain his or her reasons for what was done at the trial. "If in a given case the petitioner does not have access to the information necessary to sustain his burden of proof, the district court is of course free to make appropriate adjustments in the allocation of the burden." Washington v. Strickland, supra, at 1261 n. 31. Here, the State did not call trial counsel as a witness; its brief in this Court does not suggest what counsel's strategy was; we do not know what it was; and no court, state or federal, has ever found that counsel's conduct was the result of a strategic decision. In this situation, if I were free to do so, I should hold that counsel was constitutionally ineffective and that petitioner should have a new trial. He would not be released from prison. There would simply be a new trial as to punishment, and the worst that could happen, from the point of view of the State, would be a sentence of life imprisonment.
>
> Obviously my view of the proper allocation of the burden of proof is influenced in part by the fact that this is a death case. The more serious the consequences of a wrong decision, the more one wants to be careful to make the right one. That is what burden of proof is all about. Rules about presumptions and burdens of proof reflect one's views about where the risk of loss ought to be placed, and about what kinds of mistakes are more tolerable than others. Presumptions are not usually applied in favorem mortis. It is not a novel proposition that judgments inflicting the penalty of death should be hedged about with greater safeguards. The very existence of bifurcated trials in death cases proves that, if proof be needed. It may be true that the same legal principles govern ineffectiveness of counsel in capital as in non-capital cases; it is also true that the seriousness of the charges is a factor to be considered in assessing counsel's performance. Ante, at 962-963. It is not asking too much, when life is at stake, to require the State or counsel himself to explain a choice to present no evidence in mitigation.

2. The second reason which Mr. Adams has tendered for granting certiorari in his case is

> BECAUSE THE LOWER COURT'S APPROVAL OF THE FELONY MURDER AGGRAVATING CIRCUMSTANCE IN THIS CASE DIRECTLY CONFLICTS WITH THIS COURT'S RECENT PRONOUNCEMENTS IN ZANT V. STEPHENS CONCERNING THE NECESSARY FUNCTION OF STATUTORY AGGRAVATING CIRCUMSTANCES.

The brief in opposition asserts that this issue as well was not raised in the Eleventh Circuit and should, accordingly, not be reviewed by this Court. Again, respondent's assertion is flatly wrong. In his briefs before the Eleventh Circuit, Mr. Adams argued that the death penalty was disproportionate for one convicted, as he was, of "pure" felony murder (i.e., murder which is non-premeditated and committed without the actual intent to kill). Relying on Enmund v. Florida, ___U.S. ___, 102 S.Ct. 3368 (1982) and Justice White's concurring opinion in Lockett v. Ohio, 438 U.S. 586 (1978), Mr. Adams argued that death was too severe a penalty for one who did not kill with the actual intent to kill. As part of this argument, Mr. Adams pointed out precisely what he argues here: that a death sentence which relies upon the underlying felony murder as an aggravating circumstance is arbitrary, because the same underlying fact is genuinely a mitigating circumstance -- yet Florida law permits it to be treated as an aggravating circumstance.

> Finally, Eddings v. Oklahoma, ___U.S.___, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) teaches that even mental factors which do not completely excuse criminal liability must be considered as relevant evidence on the issue of sentence in a capital case. Thus, even though the non-intentional nature of the killing in the instant case is not a legally sufficient excuse which would result in the total avoidance of culpability for a capital felony because of the felony murder theory of prosecution -- although it may well have been a complete defense had the State charged premeditated murder -- it is a matter which is properly considered in mitigation of the sentence. But what provides the mitigation in the present case also provides an aggravation: the underlying felony, as a matter of law. Once again, the sentencer is left without substantial guidance on the punishment issue, leading to that standardless and arbitrary sentencing process condemned in Furman v. Georgia, supra.

Brief for Petitioner-Appellant, at 33-34 (attached hereto, in relevant part, as Appendix B). Accordingly, the issue presented here -- that the use of "pure" felony murder as an aggravating

circumstance treats as aggravating a factor which is genuinely mitigating, resulting in an unreliable, arbitrary sentence determination -- was presented to the Eleventh Circuit, even though this Court's decision which brought this issue into focus, Zant v. Stephens, ___U.S.___, 103 S.Ct. 2733 (1983), had not at that point been rendered.

3. The third reason which Mr. Adams has tendered for granting certiorari in his case is

> TO DETERMINE WHETHER FLORIDA'S HAPHAZARDLY APPLIED PROCEDURAL DEFAULT RULE CAN BAR FEDERAL HABEAS CORPUS REVIEW OF CAPITAL SENTENCING DECISIONS.

Respondent tries to minimize the significance of this issue by arguing that the Florida cases Mr. Adams relies on do not show a haphazard application of the procedural default rule. In particular, respondent argues that there was no procedural default in Straight v. Wainwright, 422 So.2d 827 (Fla. 1982). Any reading of Straight or the other Florida cases relied on by Mr. Adams in his petition, however, shows that respondent misunderstands the plain language of these cases. Straight clearly involved a procedural default on the same mitigating circumstance instructional issue as that which Mr. Adams sought to have reviewed, for Straight not only raised the instructional issue on its merits, 422 So.2d at 831, he also claimed that his lawyer was ineffective for failing to raise this issue on appeal, 422 So.2d at 829-830 -- a procedural default in Florida. Accordingly, the opinion in Straight shows there was procedural default and that the procedural default did not bar review of the issue on its merits. The other Florida cases cited by Mr. Adams show that the Straight approach -- ignoring procedural default and reaching the merits -- is sometimes followed, and sometimes not, without any rational basis. Thus, the issue raised by Mr. Adams is unquestionably there -- despite the respondent's self-imposed blinders. And it is eminently worthy of review, a point which the respondent in no way contests.

FOR THESE REASONS, as well as those set forth in Mr. Adams' petition for writ of certiorari, the Court should grant certiorari.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier/mail to Honorable Sharon Lee Stedman, Assistant Attorney General, 111 Georgia Avenue, Elisha Newton Dimick Building, West Palm Beach, Florida 33401, this 29th day of December, 1983.

Richard H Burr, III
Of Counsel

IN THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 82-5595

JAMES ADAMS,

Petitioner-Appellant,

v.

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Corrections,

Respondent-Appellee.

On Appeal from the United States District Court
For the Southern District of Florida

REPLY BRIEF FOR PETITIONER-APPELLANT

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STATEMENT OF THE ISSUES

1. Whether Petitioner was deprived of the reasonably effective assistance of counsel at his capital sentencing hearing, thus requiring the setting aside of his death sentence.

2. Whether Petitioner's death sentence is grossly disproportionate, excessive, and the product of unreliable proceedings, since it was imposed for a non-premeditated homicide committed during the commission of a felony, which was indistinguishable from any other felony murder.

3. Whether Petitioner's death sentence is the product of unreliable proceedings, since it was imposed pursuant, in part, to the jury's and trial judge's consideration of legally improper aggravating circumstances.

4. Whether Petitioner and other capital defendants in Florida have been deprived of critical Eighth and Fourteenth Amendment rights by the Florida Supreme Court's harmless error rule concerning the sentencer's consideration of and reliance upon legally improper aggravating circumstances.

5. Whether Petitioner was deprived of his right to an individualized sentence determination by the trial court's exclusion of evidence of non-statutory mitigating circumstances and instructions to the jury precluding the consideration of non-statutory mitigating circumstances.

6. Whether Petitioner's constitutional rights were violated by the Florida Supreme Court's ex parte consideration of extra-record psychiatric, psychological, and correctional reports in his and others' pending capital appeals.

7. Whether Petitioner was deprived of equal protection and due process by the resolution of his claim concerning the arbitrary application of the death penalty without first providing the expert assistance necessary for the full and fair consideration of this claim.

ARGUMENT

I. PETITIONER WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS CAPITAL PROSECUTION.

The State magnanimously concedes that it "does not materially disagree" with the well-established standards for assessing the ineffective assistance of counsel as set forth in Mr. Adams' opening brief, but then adds a novel test, announced in Gray v. Lucas, 677 F.2d 1086 (5th Cir. 1982), that a defendant must show that knowledge of any uninvestigated evidence would have altered defense counsel's strategy in order to prevail on a claim that counsel's failure to ivestigate prevented him from making informed tactical choices. R.Br. 11.[1] But this test is, of course, not binding on this Court, since Gray was decided by the present Fifth Circuit Court of Appeals after creation of this Court for the Eleventh Circuit. Only those cases decided by the Fifth Circuit prior to the split in the Court are treated as controlling precedent of this Court. Bonner v. City of Pritchard, 661 F.2d 1206 (11th Cir. 1981).

Even more fundamentally, however, the rule stated in Gray is not one with any firmly rooted antecedent in the law, but rather amounts to an aberration, inconsistent with precedent and policies in Sixth Amendment jurisprudence. In particular, Gray's apparent conclusion that a decision as to strategy can precede and even limit counsel's responsibility to conduct an independent and thorough

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[1] References to the briefs submitted by the parties herein will be designated as follows:

"Pet. Br."	Petitioner's initial brief
"R. Br."	Respondent's answer brief

pre-trial investigation flies in the face of legal principles firmly established in, e.g., Gaines v. Hopper, 575 F.2d 1147, 1149-1150 (5th Cir. 1978); Washington v. Strickland, 673 F.2d 879, 892 (5th Cir. 1982), reh. en banc granted __ F.2d __ (1982); Beavers v. Balkcom, 636 F.2d 114, 116 (5th Cir. 1981); Davis v. Alabama , 596 F.2d 1214, 1220-1221 (5th Cir. 1979), vacated as moot, 446 U.S. 903 (1980). As these cases recognize, just as "a purported trial without adequate preparation amounts to no trial at all," Brooks v. Texas, 381 F.2d 619, 624 (5th Cir. 1967), so a purported strategy without adequate investigation of the necessary facts to support a strategic choice amounts to no strategy at all. Indeed, the above cases reflect a long-standing skepticism that truly competent counsel could ever reach an informed decision without gathering the facts required to tell the attorney how best to pursue the obligations of an advocate.

In addition, Gray's test of prejudice, supra , 677 F.2d at 1093, substitutes a subjective standard of inquiry into counsel's thought process for the objective test which has prevailed in this Circuit since Davis v. Alabama, supra, which requires an examination of the specific and concrete evidence that an investigation would have uncovered and a determination of whether that evidence would have been helpful to the defense. The Gray standard, on the other hand, would direct the federal courts into the murky and speculative area of counsel's mental processes: "the court would have to put itself in the place of an attorney who was better informed by a client who was better advised, and decide what differnt decisions that attorney would have made. This will often be a hopelessly intrictate task." Davis v. Alabama, supra, 596 F.2d at 1223, see also Washington v. Strickland, supra,

at 901-902.

Enunciating a standard both more capable of consistent administration and more in accordance with the line of cases cited, supra, is the decision of the Third Circuit Court of Appeals in United States v. Baynes, 687 F.2d 659 (3d Cir. 1982). In that case, defense counsel failed to refer to or make use of a voice exemplar, although the only evidence of his client's guilt was a twelve-word recorded telephone conversation in which he allegedly participated. The appellate court noted,

> "In this case, an avenue that conceivably might have led to the exoneration of the defendant was not explored by trial counsel; no attempt was made to compare the voice exemplar with the intercepted tape. To be sure, had such a comparison been made, [the defendant's] attorney might well have decided as a matter of trial strategy not to refer to the voice exemplar at trial. ...Such a decision on the part of trial counsel properly could have been made, however, only after a careful and comprehensive comparison of the two recordings had been conducted." Id. at 666 (emphasis original.)

Thus whether or not an attorney has appropriately made tactical trial decisions will not even be addressed until it has first been established that he had the necessary information to make such a decision as a result of his adequate investigation of the case.

Baynes is also instructive with respect to the State's main argument that Mr. Adams did not, at the State post-conviction hearing below, present sufficient competent evidence to support his claims of ineffective assistance. R.Br. 13, 18, 20. The Baynes court observed, regarding the focus of proof in such cases that

> "To prevail on this appeal, [the defendant] need not prove that it was not his voice on the intercepted recording; instead he need only show that his trial attorney's 'exploration of the voice exemplar issue might have led to a viable defense and a verdict favorable to [him]' [Citations omitted]." Id. at 671. (emphasis original)

In the present case, it was not and could not have been Mr. Adams' obligation, at the post-conviction hearing, to litigate anew, as if in a penalty phase hearing, the approrpiateness or inappropriateness of the death sentence imposed against him. That was simply not the question before the trial judge at that time. Instead, the trial judge was being asked to determine whether defense counsel had adequately investigated the factual matters available to him so that he could make an informed decision as to how to proceed at the sentencing phase. Viewed in this light, there can be no question that Mr. Wilkinson, Mr. Adams' support counsel, was entirely competent to testify as to the facts within his own direct knowledge: that is, what investigation, if any, was actually performed by lead counsel, Mr. Schopp, and what information Mr. Wilkinson was readily able to discover in his own investigation made after trial and sentencing. Mr. Wilkinson testified fully regarding the results of his own exploration of the mitigation in the present case, and, to say the least, they were not fruitless. Thus, Mr. Adams successfully showed that information existed which could and should have been investigated prior to Mr. Adams' sentencing, since there is no question that it was relevant thereto,[2] but that no such investigation was undertaken. He, therefore, met his burden of showing that trial counsel did not render "reasonably effective assistance of counsel."

Similarly unfounded is the State's attempt to explain the rousing closing argument by Mr. Schopp as being "aimed at having the

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[2]Even less merit can attach to the State's contention that the failure to investigate Mr. Adams' prior uncounselled convictions was harmless, since such convictions can be considered at sentencing. R.Br. 19. Such a contention has been specifically rejected in Florida, Lloyd v. State, 346 So.2d 1075(Fla. 2d DCA 1977); Glenn v. State, 338 So.2d 263 (Fla. 2d DCA 1976); Hicks v. State, 336 So.2d 1244 (Fla. 4th DCA 1976), which controls the evidentiary parameters of the sentencing proceeding in the instant case.

jury view the death penalty as an uncivilized ultimate act which should not be tolerated against other human beings." R.Br. 15. Not only does this characterization ignore that portion of defense counsel's argument wherein he conceded that "the Florida legislature has declared in its infinite wisdom that the death penalty is a proper judgment in some cases." (T 1179)[3] It also ignores that this jury had been death qualified: each juror sitting on this case had affirmed that he could recommend a death sentence, thus rendering defense counsel's "argument", as the State interprets it, rejected before it was made.

The State's creative manipulation of the record to support its argument in this appeal does not end here, however. The State further relies for affirmance of the district court's order below on the fact that lead trial counsel, Mr. Schopp, did not himself testify. R.Br. 12, 20. In addressing this position, it is important to focus on the actual legal issue before the trial court at the time of the hearing on Mr. Adams' motion for post-conviction relief. By urging that Mr. Adams was fatally remiss in not calling this witness to testify, the State completely ignores the essentially antagonistic relationship now existing between Mr. Adams and his erstwhile counsel. Mr. Adams is, after all, alleging that his trial attorney did not perform the duties required of him. The natural response of counsel against whom such a charge is made will very likely be to seek to justify—even where no justification is legally possible—his actions and thus try to protect his professional standing. It is because of

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[3]References to the record will be pursuant to the same abbreviations set forth in Mr. Adams' opening brief at footnote 1.

this inherent conflict that counsel other than Mr. Adams' trial counsel was appointed to represent Mr. Adams in the post-conviction proceeding. Adams v. State, 380 So.2d 421 (Fla. 1980). And it is because of the adverse relationship created by the allegation of ineffective assistance that it is ordinarily the State, and not the defendant, who calls trial counsel to defend himself, once the defendant has proven through competent evidence that trial counsel was, in fact, derelict, as in the instant case. This was never, of course, done in the present case, so that the State's suggestion that, "Perhaps no proof was adduced because there is no such proof," R.Br. 20, tells more strongly not against Mr. Adams' position, but against its own suggestion, unsupported by anything other than sheer speculation and an unacceptably strained reading of the record, that trial counsel made a "tactical decision" to give up at the penalty phase.

In short, there is not, as the State appears to believe, any presumption that a trial attorney's deficiencies are always the result of strategic considerations, rather than ignorance. Instead, that a legitimate basis for counsel's action and/or inaction exists is a matter which it is incumbent upon the State to show. Conversely, it cannot conceivably be the duty of a defendant to call a witness in order to elicit adverse and self-serving statements which the defendant disputes but is precluded from testing through cross-examination. Our adversary system of justice simply does not allow for such a Catch 22 situation. Consequently, Mr. Adams has established the ineffectiveness of the representation afforded him by trial counsel, and the State has totally failed to rebut this showing in any way, either below or before this Court.

II. EXECUTION OF THE DEATH SENTENCE IMPOSED AGAINST MR. ADAMS IS GROSSLY DISPROPORTIONATE, EXCESSIVE, AND STANDARDLESS WHERE THE KILLING WAS NOT DELIBERATE BUT COMMITTED DURING A FELONY, AND WHERE AN AGGRAVATING CIRCUMSTANCE WAS APPLIED WHICH FAILS TO DIFFERENTIATE THIS CASE FROM ANY OTHER FELONY-MURDER.

The State contends in response to Mr. Adams' complaint herein, that Wainwright v. Sykes, 433 U.S. 72 (1977) precludes this Court's review of the issue. R.Br. 24. This contention is without merit: the impropriety of Mr. Adams' death sentence for an untentional killing during the course of a felony was specifically raised in the Second Supplemental Brief filed in his behalf on direct appeal to the Florida Supreme Court. The State chose not to respond to that issue then, and it certainly never argued that the issue was waived until this case arrived at the federal district court. Moreover, the Florida Supreme Court rejected this issue on its merits by its opinion affirming Mr. Adams' conviction and death sentence.

The instant case therefore falls within the parmeters of Henry v. Wainwright, 686 F.2d 311 (5th Cir. 1982) (Unit B) (on remand). In that case, this Court considered, pursuant to the Supreme Court's remand, whether a sentencing issue in a death penalty case had been waived in the Florida state courts, thus precluding federal review. Henry concluded that the issue was not waived, even if the defendant's objection below was inadequate, strictly speaking, to preserve the issue. this holding was in turn based on a finding that the Florida appellate court considered the issue on the merits, ignoring any procedural

default which might have existed. And,

> "If Florida dealt with the merits of Henry's objection, whether or not there was a procedural default at trial under state law, then a federal habeas corpus court must also determine the merits of the claim. [Citations omitted.]" Id. at 313.

In Henry, as in the present case, the issue involved had been argued on direct appeal to the Florida Supreme Court. In Henry, as in the present case, that Court did not expressly discuss its rationale for rejecting the issue on appeal.[4]

Yet this Court noted and relied on the State court's avowed policy of exercising an especially broad scope of review in death cases, as expressed in Elledge v. State, 346 So.2d 998, 1002 (Fla. 1977). Precisely the same considerations, then, attach to both the instant case and Henry v. Wainwright, supra, and the State's reliance on Wainwright v. Sykes, supra, is misplaced.

Also patently erroneous is the State's argument that no federal issue is raised by the instant challenge. The effect of the Supreme Court's decision in Proffitt v. Florida, 428 U.S. 242 (1976) on future attacks on the application of an aggravating factor under Florida's capital sentencing scheme was

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[4] In the present case, the Florida Supreme Court addressed only the "principal issue for determination," which related to jury instructions during the guilt phase of the trial, Adams v. State, 341 So.2d 765, 766 (Fla. 1977), and it additionally affirmed the death sentence after stating, "our final responsibility is to consider the appropriateness of the death sentence in order to determine independently whether the death penalty is warranted." Id. at 769. In Henry, the Supreme Court likewise generally concluded that "no reversible error is made to appear..." See, Henry v. Wainwright, supra, at 313.

discussed in Proffitt v. Wainwright, 685 F.2d 1227, 1261-1262 at fn. 52 (11th Cir. 1982). This Court noted that the United States Supreme Court in Godfrey v. Georgia, 446 U.S. 420, 422, 433-432 (1980) had itself, in a plurality opinion, joined in this respect by two concurring Justices, addressed just such a contention on federal constitutional grounds.[5] This Court consequently concluded, rightly, "that the language in the Spinkellink [v. Wainwright, 578 F2d 582 (5th Cir. 1978)] opinion precluding federal courts from reviewing state courts' application of capital sentencing criteria is no longer sound precedent." Proffitt v. Wainwright, supra. The State's attempt at avoidance sub judice must therefore fail.

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[5] See also Zant v. Stephens, ___ U.S. ___, 102 S Ct. 1855, 1857 72 L.Ed.2d 222, 225-226 (1982); "In Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed. 2d 859 (1976), we upheld the Georgia death penalty statute because the standards and procedures set forth therein promised to alleviate to a significant degree the concern of Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed. 2d 346 (1972), that the death penalty not be imposed capriciously or in a freakish manner. We recognized that the constitutionality of Georgia death sentences ultimately would depend on the Georgia Supreme Court construing the statute and reviewing capital sentences consistently with this concern. See 428 U.S. at 198, 201-206, 96 S.Ct. at 2937, 2938-2940 (Opinion of Stewart, Powell, and Stevens, JJ.); id at 211-212- 222-224, 96 S.Ct. at 2943, 2947 2949 (White, J., concurring in judgment). Our review of the statute did not lead us to examine all of its nuances. It was only after the state law relating to capital sentencing was clarified in concrete cases that we confronted and addressed more specific constitutional challenges in Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977); Presnell v. Georgia, 439 U.S. 14, 99 S.Ct. 235, 58 L.Ed.2d 207 (1978); Green v. Georgia, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979); and Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980)."

III. THE AGGRAVATING CIRCUMSTANCES CONSIDERED BY THE JURY AND JUDGE FAILED TO CHANNEL THEIR SENTENCING DISCRETION AS REQUIRED BY THE EIGHTH AND FOURTEENTH AMENDMENTS.

In his opening brief Mr. Adams argued that the sentencers' consideration of the "heinous, atrocious, or cruel" statutory aggravating circumstance, which was unsupported by the evidence, and of two non-statutory aggravating circumstances, unchanneled sentencing discretion in violation of the Eighth Amendment. The state has responded that the evidence was sufficient to support a finding of the heinous, atrocious, or cruel circumstance, and that one of the non-statutory circumstances was considered on rebuttal of a mitigating circumstance rather than in aggravation. The first response miscontrues the record. The second misconstrues the trial judge's findings of fact in support of the death sentence.

The state has argued (R. Br. 28) that the evidence was sufficient to support a finding that the murder was especially heinous, atrocious, or cruel. The heart of the argument is that the "victim did not die quick, he suffered much. It was indeed brutal." (Ibid.) Suffering, consciousness of pain, and awareness of numerous physical assaults prior to death are critical elements in support of this aggravating circumstance. Simmons v. State, 419 So.2d 316, 319 (Fla. 1982); Breedlove v. State, 413 So.2d 1, 9 (Fla. 1982), cert.denied, ___U.S.____, (October 4, 1982); Scott v. State, 411 So.2d 866, 869 (Fla. 1982); Arango v. State, 411 So.2d 172, 175 (Fla. 1982), cert.denied, ___U.S.___, 102 S.Ct. 2973 (1982). However,

the record in this case does not demonstrate that the victim suffered, was conscious of pain or was aware of the various physical assaults against him.

To the contrary, the record conclusively shows that the victim was immediately rendered unconscious by the first blow to his head (T 797), and that he never regained consciousness thereafter (T 284, 297, 447, 778-780, 796-797). The prosecution even conceded this. (T, 244, 251) While the decedent did not die instantaneously, his consciousness of the acts done to him and of the pain associated with them nonetheless ended instantaneously. Thus, the manner in which decedent was killed was the manner in which the Florida Supreme Court has consistently held not to be heinous, atrocious, or cruel. Simmons v. State, supra; Halliwell v. State, 323 So.2d 557, 561 (Fla. 1975) (cited in Mr. Adams' opening brief). Cf. Breedlove v. State, supra; Scott v. State, supra; Arango v. State, supra. Accordingly, the very violation of the Eighth Amendment found with respect to this aggravating circumtance in Proffitt v. Wainwright, 685 F.2d 1227, 1261-1265 (11th Cir. 1982), is also present here.

Equally unavailing is the state's argument that the trial judge's consideration of Mr. Adams' record of non-violent crimes was in rebuttal of a mitigating circumstance[6] rather than

[6] Section 921.141 (6) (a), Florida Statutes, provides for the consideration of the absence of a significant criminal history as a mitigating circumstance.

in aggravation. The judge's findings of fact in support of the death sentence belie such a strained interpretion.[7] In relevant part, the judge found the following:

> "... pursuant to the mandate of Florida statute 921.141 requiring that the determination of the court to impose a sentence of death be supported by specific written findings of fact based upon the records of the trial and the sentencing proceedings, it is hereby found and determined that aggravating circumstances, far outweighing any mitigating circumstances, are as follows:
>
> 1. The capital felony of murder in the first degree was committed by the defendant, James Adams while he was under a sentence of imprisonment for 99 years by the Court of General Sessions, Dyer County, Tennessee after a conviction on the charge of rape.
>
> 2. The defendant was previously convicted of a capital felony, same being the charge of rape above referred to and being a felony involving also the use or threat of violence to the person.
>
> . . . .
>
> 6. The capital crime of murder in the first degree was especially heinous, atrocious and cruel.
>
> By his own admission the defendant was previously convicted of crimes on at least five occasions and the further undisputed evidence shows the defendant has a record involving crimes of violence; that he is an escapee of the State Prison System of the State of Tennessee and that the body of the victim was mutilated, mangled and disfigured unnecessarily."

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[7] That Mr. Adams' post-conviction hearing witness, on cross, may have agreed tentatively with the state's interpretation of the judge's findings is not binding upon Mr. Adams, since his legal conclusion is no more binding upon the Court than the Florida courts' legal conclusion.

(RD 84-85) (emphasis supplied). In the context of these findings, Mr. Adams' five previous convictions (without proof of any violence associated with them) were clearly seen by the judge as aggravating. His findings, as noted in his introductory remarks, discussed only the aggravating circumstances. The five previous convictions are mentioned in a paragraph apparently summarizing what the judge deemed the most aggravating of the just-enumerated factors. The convictions are mentioned in pari materia with Mr. Adams' "record involving crimes of violence." In this context, the judge unquestionably considered the prior crimes in aggravation, rather than in rebuttal of mitigation. Moreover, in the trial court, Mr. Adams never proffered the lack of a criminal history in mitigation. To suggest that this is nonetheless the context in which the trial court considered Mr. Adams' non-violent criminal record is to ignore the way in which the issues were tried and to urge this Court to violate the principles of Presnell v. Georgia, 439 U.S. 14 (1978). Such a plea should be rejected, and Mr. Adams' sentence should be vacated because it was imposed, in part, upon the consideration of the non-statutory aggravating circumstance of Mr. Adams' non-violent criminal record.

IV. THE FLORIDA SUPREME COURT'S HARMLESS ERROR RULE, CONCERNING THE SENTENCER'S RELIANCE UPON LEGALLY IMPROPER AGGRAVATING CIRCUMSTANCES, DEPRIVED PETITIONER AND DEPRIVES OTHER CAPITAL DEFENDANTS OF RIGHTS NECESSARY TO THE CONSTITUTIONAL IMPOSITION OF THE DEATH PENALTY.

With this issue, Mr. Adams has drawn into question only the following aspect of Florida's harmless (capital sentencing)

error rule: when there is error in the finding of some, but not all, of the aggravating circumstances, and there are no mitigating circumstances present, the error in the assessment of aggravating circumstance is necessarily (and always) harmless. The state's response confuses and muddles the straightforwardness of this issue. Mr. Adams is not arguing here that the Florida Supreme Court never finds the erroneous assessment of aggravating circumstances harmful, or never engages in a process of determining whether such error affected the critical weighing process in a capital sentencing proceeding. Nor is he arguing that the Florida Supreme Court should "automatically" reverse a death sentence upon a showing of the invalidity of just one of the aggravating circumstances. He is arguing only that the Florida Supreme Court mechanistically and "automatically" affirms death sentences which are based in part upon invalid aggravating circumstance when no mitigating circumstances are present, and that this process - which leaves no room for even an occasional reversal under such circumstances - violates the Eighth Amendment.

The state tries to hide this issue by arguing that Mr. Adams' argument proceeds on a faulty premise. (R. Br. 32-33) With this diversion in hand, the state thereafter never responds to Mr. Adams' three-part analysis of the unconstitutionality of the harmless error rule. The state's obfuscatory tactic is of no use, however, for Mr. Adams' premise is as solid as any premise can be: it is absolutely uncontradicted by the decisions of the Florida Supreme Court. Since the effective date of the current death penalty statute in Florida, no death sentence has been reversed under the circumstances presented by Mr. Adams'

case - in which some aggravating circumstances were erroneously considered but there were no mitigating circumstances found. See Cooper v. State, 336 So.2d 1133, 1140-1142 (Fla. 1976);[8] Adams v. State, 341 So.2d 765, 769 (Fla. 1977) [the case of the petitioner herein]; Aldridge v. State, 351 So.2d 942, 944 (Fla. 1977); Gibson v. State, 351 So.2d 948, 951-953 (Fla. 1977); Jackson v. State, 359 So.2d 1190, 1194-1195 (Fla. 1978); Washington v. State, 362 So.2d 658, 666 (Fla. 1978); Ford v. State, 374 So.2d 496, 503 (Fla. 1979); Dobbert v. State, 375 So.2d 1069, 1071 (Fla. 1979); Clark v. State, 379 So.2d 97, 99, 104 (Fla. 1979); Shriner v. State, 386 So.2d 525, 534 (Fla. 1980); Johnson v. State, 393 So.2d 1069, 1072-1074 (Fla. 1980); Peek v. State, 395 So.2d 492, 497-500 (Fla. 1981); Demps v. State, 395 So.2d 501, 505-506 (Fla. 1981); Palmes v. State, 397 So.2d 648, 656-657 (Fla. 1981); Straight v. State, 397 So.2d 903, 909-910 (Fla. 1981). Armstrong v. State, 399 So.2d 953, 962-963 (Fla. 1981); Sireci v. State, 399 So.2d 964, 971 (Fla. 1981); Enmund v. State, 399 So.2d 1362, 1371-1373 (Fla. 1981), reversed on other grounds, ___U.S.___, 102 S.Ct. 3368 (1982); White v. State, 403 So.2d 331, 337-341 (Fla. 1981); Messer v. State, 403 So.2d 341, 348-349 (Fla. 1981); Tafero v. State, 403 So.2d 355, 362 (Fla. 1981); Francois v. State, 407 So.2d 885, 890-891 (Fla. 1982); Smith v. State, 407 So.2d 894, 903 (Fla. 1982); Raulerson v. State, ___So.2d___, 1982 F.L.W., S.C.O. 376, 378 (Fla., August 26, 1982); Bollender v.

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[8]For ease of reading, denials of certioarari have not been cited. Certiorari grants or subsequent modifications have been noted.

State, __ So.2d___, 1982 F.L.W., S.C.O. 490, 492 (Fla., October 28, 1982).[9] Thus it is axiomatic that the erroneous assessment of aggravating circumstances, in the absence of any mitigating circumstances, is deemed harmless. Conversely, it is also axiomatic that when the erroneous assessment of aggravating circumstances is deemed harmful, there are always mitigating circumstances which have been found to exist;[10] or is evidence of mitigating circumstances which should have been admitted, or if admitted, which should have been found to exist;[11] or is a jury recommendation of life imprisonment, which is tantamount to a finding of mitigating circumstances.[12]

Accordingly, Mr. Adams is not proceeding on a faulty premise. His premise -- that the Florida Supreme Court automatically affirms death sentences like his, which are based upon some

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[9] The only case deviating at all from this pattern is Maggard v. State, 399 So.2d 973 (Fla. 1981), in which two of three aggravating circumstances were invalid, and no mitigating circumstances were found. Id. at 977. While reaffirming the harmless error rule, the court reversed the death sentence, because evidence of the defendant's non-violent criminal record was admitted despite the defendant's waiver of any reliance on the mitigating circumstance (lack of significant record) which would have provided the only proper foundation for its admission. Ibid.

[10] Elledge v. State, 346 So.2d 998 (Fla. 1977); Riley v. State, 366 So.2d 19 (Fla. 1979); Mikenas v. State, 367 So.2d 606 (Fla. 1979); Menendez v. State, 368 So.2d 1279 (Fla. 1979); Miller v. State, 373 So.2d 882 (Fla. 1979); Fleming v. State, 374 So.2d 954 (Fla. 1979); Lucas v. State, 376 So.2d 1149 (Fla. 1979); Lewis v. State, 377 So.2d 640 (Fla. 1980); Gafford v. State, 377 So.2d 333 (Fla. 1980); Mines v. State, 390 So.2d 332 (Fla. 1980); Blair v. State, 406 So.2d 1103 (Fla. 1981); Moody v. State, 418 So.2d 989 (Fla. 1982).

[11] Huckaby v. State, 343 So.2d 29 (Fla. 1977); Mines v. State, supra [note 10]; Perry v. State, 395 So.2d 170 (Fla. 1981); Jacobs v. State, 396 So.2d 713 (Fla. 1981); Ferguson v. State, 417 So.2d 631 (Fla. 1982); Ferguson v. State, 417 So.2d 639 (Fla. 1982).

[12] See, e.g., Tedder v. State, 322 So.2d 908 (Fla. 1975); Provence v. State, 337 So.2d 783 (Fla. 1976); Williams v. State, 386 So.2d 538 (Fla. 1980).

invalid aggravating circumstances offset by no mitigating circumstances -- is factually uncontradicted. This Court can now reach the merits of Mr. Adams' argument, which the state failed to reach in its brief, that such a practice violates the Eighth Amendment. See Pet. Br. 40-50.[13]

V. THE TRIAL COURT'S RULING CONCERNING THE SCOPE OF ADMISSIBLE MITIGATING EVIDENCE IMPERMISSIBLY RESTRICTED THE CONSIDERATION OF MITIGATING CIRCUMSTANCES.

In his opening brief, Mr. Adams argued that the trial judge issued an unrecorded pre-sentencing-hearing order restricting the presentation of mitigating circumstances to those contained in the statute. In response the state argued that the factual basis for this claim (the issuance of such an order) was too tenuous to support the claim and implied that this Court is bound by the Florida court's resolution of the claim. (R. Br. 37) Neither of these points has merit.

The factual basis of the claim is certainly established sufficiently -- given the error involved -- to require the Court to reach the merits of the claim. In Stephens v. Zant, 631 F.2d 397 (5th Cir.1980), modified, 648 F.2d 446 (5th Cir. 1981),

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[13] The vigor of the state's effort to avoid this issue cannot be gain said. While accusing Mr. Adams of proceeding on a faulty premise, the state itself proceeds on a faulty premise, asserting that the harmless error test is really "whether or not the Florida Supreme Court can be satisfied beyond a reasonable doubt that the results of the weighing process would have been no different." (P. Br. 36) If the court genuinely proceeded on this basis, then the court would most certainly have reversed some death sentences based upon faulty aggravating circumstances, even in the absence of mitigating circumstances. This Court has. See Henry v. Wainwright, (5th Cir. 1981), judgment reinstated, 686 F.2d 311 (5th Cir. 1982) (Unit B); Proffitt v. Wainwright, supra, 685 F.2d at 1268-1269. But the Florida Supreme Court never has. The only explanation for this is that the Florida Supreme Court applies the automatic harmless error test discussed by Mr. Adams, not the test put forward by the state.

cert. granted on other grounds, ___U.S.___, 102 S.Ct. 575 (1981), this Court considered a related issue: whether a death sentence can constitutionally be affirmed when the transcript before the reviewing court does not contain the proceedings of the entire trial. 631 F.2d at 402. Relying on Gardner v. Florida, 430 U.S. 349 (1977) and Gregg v. Georgia, 428 U.S. 153 (1976), the Court held that " [i]f the record presented to the Georgia Supreme Court was so deficient that it ... would create 'a substantial risk' that the penalty is being inflicted in an arbitrary and capricious manner, ... petitioner's sentence cannot be permitted to stand." 631 F.2d at 403. After articulating this principle, the Court outlined five considerations relevant to determining whether a particular claim arising from an omission in the record meets this test. 631 F.2d at 403-404. Mr. Adams' claim satisfies all five considerations.

First, the unrecorded order was a "key element" in the procedure by which the death penalty was imposed, 631 F.2d at 403, for it prevented the consideration of all the aspects of Mr. Adams' character and record and all the circumstances of the offense which might have been proffered in mitigation. See Lockett v. Ohio, 438 U.S. 586, 604-605 (1978); Eddings v. Oklahoma, ___U.S.___, 102 S.Ct. 869 (1982). Second, the unrecorded order gave "the appearance of arbitrariness," ibid., because of its curtailment of the presentation and consideration of mitigating circumstances, supra. Third, there is affirmative proof of the nature of the untranscribed order, ibid., which

significantly curtailed Mr. Adams' Eighth Amendment rights.[14] Fourth, there was nothing contained elsewhere in the record, 631 F.2d at 404, to contradict the proof of the untranscribed order and its prejudice to Mr. Adams.[15] Finally, Mr. Adams has alleged substantial prejudice from this order because of its curtailment of the investigation and presentation of available non-statutory mitigating circumstances. Taken together, these considerations demonstrate that the unrecorded order created a substantial risk that Mr. Adams' death sentence was inflicted in an arbitrary and capricious manner, necessitating the setting aside of his sentence. Stephens v. Zant, supra.

The Florida Supreme Court's determination that the evidence of the unrecorded order was insufficient to require such a result, see Adams v. State, 380 So.2d 423, 424 (Fla. 1980), in no way binds this Court. The determination of the legal sufficiency of this evidence is a matter of federal law. Stephens v. Zant, supra. It is not a "factual determination" to which this Court must defer. Sumner v. Mata, 449 U.S. 539, 547 (1980).

Accordingly, because Mr. Adams has sufficiently established plain Lockett-Eddings error, his death sentence must be vacated.

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[14] The State's characterization of Mr. Wilkinson's recollection as "vague" is unfounded. Mr. Wilkinson testified that he expressly recalled Judge Sample's limitation on mitigating circumstances (PCT 14). (Apparently, such a limitation was not unique to the instant trial, leading to Mr. Wilkinson's sole uncertainty in the matter, which was dispelled after conferring with lead counsel, Mr. Schopp.) See Pet. Br. at page 53.

[15] It is an affront to the intellectual integrity of this Court to suggest, as the state does (R. Br. 38), that defense counsel's appeal to the jury on the basis of Mr. Adams' being "a human being" is sufficient evidence to show that this order did not curtail counsel's effort to present non-statutory mitigating circumstances.

VI. THE FLORIDA SUPREME COURT'S EX PARTE CONSIDERATION OF EXTRA-RECORD PSYCHIATRIC, PSYCHOLOGICAL AND CORRECTIONAL REPORTS IN PETITIONER'S CASE AND OTHER PENDING APPEALS VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS.

Petitioner will rely upon the discussion presented in his intial brief herein.

VII. PETITIONER WAS DENIED EQUAL PROTECTION AND DUE PROCESS BY THE RESOLUTION OF HIS CLAIM CONCERNING THE ARBITRARY APPLICATION OF THE DEATH PENALTY WITHOUT FIRST PROVIDING THE EXPERT ASSISTANCE NECESSARY FOR THE FULL AND FAIR CONSIDERATION OF THIS CLAIM.

In his opening brief, Mr. Adams argued that he had pled sufficient facts to require the provision of expert assistance in prosecuting his claim that the death penalty was (and is) being applied arbitrarily in Florida on the basis of geography, race, and other invalid factors. Two points of the state's response to this arguement merit a brief reply.

First, the state implies that the arbitrarness claim underlying the expert assitance issue has been forclosed as a matter of law by the Supreme Court in Proffitt v. Florida, 428 U.S. 242 (1976) and by this Court in Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978). This assertion, if intended, is not true. Proffitt, like Gregg in relation to Georgia, was concerned only with the facial validity of the Florida death penalty statute. Since the arbitrariness claim attacks the application of the statute, it is not foreclosed by Proffitt. See Zant v. Stephens, ___U.S.___, 102 S.Ct. 1856, 1857 (1982). Moreover, to the extent that Spinkellink can be read as foreclosing such an "as applied" attack, it "is no longer sound precedent."

Proffitt v. Wainwright, supra, 685 F.2d at 1262 n. 52. See also Smith v. Balkcom, 660 F.2d 573, 584-585 (5th Cir. 1981) (Unit B), modified, 671 F.2d 858 (5th Cir. 1982) (Unit B).

Second, the state argues that if Mr. Adams' allegations are insufficient to warrant an evidentiary hearing, they are insufficient to warrant the provision of expert assistance. The state's response confuses the standards for obtaining an evidentiary hearing with the standard for prevailing on the merits after such a hearing, and totally fails to consider the distinct issue of expert assistance in regard to such a hearing. Blackledge v. Allison, 431 U.S. 63 (1977) requires an evidentiary hearing unless there is no rationally conceivable state of facts to support the claim being advanced. Under this test, Mr. Adams was entitled to a hearing. However, he certainly could not be expected to prove his claim without expert assistance. Quite obviously, this Court cannot countenance a rule which would deprive an impecunious capital habeas corpus petitioner of the right to proceed meaningfully in a hearing to which he is entitled. Yet this is precisely what the state, in effect, has urged. The Eighth Amendment's requirement of reliability and the Fourteenth Amendment's requirement of equal protection forbid such a result.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of the foregoing has been furnished to Honorable Robert L.Bogen, Assistant Attorney General, 111 Georgia Avenue, Elisha Newton Dimick Buildng, West Palm Beach, Florida 33401, this 24th day of November, 1982.

_____
Of Counsel

IN THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 82-5595

JAMES ADAMS,

Petitioner-Appellant,

v.

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Corrections,

Respondent-Appellee.

On Appeal from the United States District Court
For the Southern District of Florida

BRIEF FOR PETITIONER-APPELLANT

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decision arrived at was therefore neither fair nor reliable, since it was based on an inaccurate, one-sided sense of Mr. Adams because of counsel's failure to convey any of the "compassionate or mitigating factors stemming from the diverse frailties of mankind." Id. Obviously, a decision to impose death under these conditions is no different from one that is founded "in part upon misinformation of constitutional magnitude." Tucker v. United States, 404 U.S. 443, 447 (1972). Errors of this kind, which affect the essential character of the capital sentencing process can never be deemed harmless or nonprejudicial. See, e.g., Gardner v. Florida, 430 U.S. 319 (1977); Green v. Georgia, 442 U.S. 95 (1979). Mr. Adams' death sentence must, therefore, be vacated.

II. EXECUTION OF THE DEATH SENTENCE IMPOSED AGAINST MR. ADAMS IS GROSSLY DISPROPORTIONATE, EXCESSIVE, AND STANDARDLESS WHERE THE KILLING WAS NOT DELIBERATE BUT COMMITTED DURING A FELONY, AND WHERE AN AGGRAVATING CIRCUMSTANCE WAS APPLIED WHICH FAILS TO DIFFERENTIATE THIS CASE FROM ANY OTHER FELONY MURDER.

Mr. Adams was indicted for felony-murder, and the prosecutor frankly conceded throughout the proceedings that the only basis for return of a first degree murder verdict was the fact that the killing occurred during a felony (T 1050). Moreover, the evidence showed that the assailant was surprised during the course of a burglary by the deceased, whose death resulted from a violent struggle likely initiated by the latter. No weapons were brought into the house by the intruder, who used a fireplace poker belonging to the Browns to repel the deceased.

Mr. Adams was thus clearly convicted of the capital crime solely because of the jury's finding that the homicide occurred during the course of an enumerated felony. But as an aggravating factor justifying imposition of the death penalty, the trial court relied on the fact that the killing occurred during the course of a felony, the same factor on which conviction was predicated, and one which necessarily exists in every felony-murder case. Not only is the death sentence excessive when there has been no finding that the homicide was intentional, as in the present case, but this reliance on a factor which does not distinguish Mr. Adams' crime from any other felony murder strips Florida's death penalty statute of compliance with the requirement that capital sentencing be imposed only upon an individualized basis, as required by the Eighth Amendment of the United States Constitution.

In Gregg v. Georgia, 428 U.S. 153 (1976), the Supreme Court expressly recognized the cruel and unusual punishment prohibition may be violated where a punishment is disproportionate to the severity of the crime. Id. at 173. The Gregg holding expressly applied only to those cases where there was a deliberate taking of life.

> "[W]e are concerned here only with the imposition of capital punishment for the crime of murder, and when a life has been taken deliberately by the offender, we cannot say that the punishment is invariably disproportionate to the crime. It is an extreme sanction, suitable to the most extreme of crimes."428 U.S. at 187 (emphasis supplied, footnote omitted.)

In Coker v. Georgia, 433 U.S. 584 (1977), the Court held that the Eighth Amendment proportionality analysis must be applied even to particular serious crimes which do not involve the deliberate taking of human life. Id. at 592. The death

penalty was found to be disproportionate for the violent felony of rape on the following test:

> "Under Gregg, a punishment is "excessive" and unconstitutional if it 1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or 2) is grossly out of proportion to the severity of the crime. A punishment might fail the test on either ground." Id.

The logic of Coker plainly applies to invalidate any death sentence imposed for commission of a non-fatal felony. See, Eberheart v. Georgia, 433 U.S. 917 (1977) (per curiam), vacating two death sentences imposed upon conviction for non-fatal rape and kidnapping.

Culpability in the present case is the same as that in the violent felony of rape for which the death sentence was found excessive in Coker, unless there is a finding of intentional intent to take a human life. For here, although Mr. Adams may bear some degree of culpability for homicide, that culpability would not be sufficient to support a first degree murder conviction, let alone a death sentence, except for the fact that the killing occurred in the course of an enumerated felony. Yet it is now settled that the infliction of capital punishment on the basis of the crime alone, without assessing the offender's individual culpability for it, ignores considerations which are "a constitutionally indispensable part of the process of inflicting death." Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

This view was explicitly endorsed by Justice White in his concurring opinion in Lockett v. Ohio, 438 U.S. 586, 625-626 (1978):

> "The value of capital punishment as a deterrent to those lacking a purpose to kill is extremely attenuated. Whatever questions may be raised concerning the efficacy of the death penalty as a deterrent to intentional murders—and that debate rages on—its function in deterring individuals from becoming involved in ventures in which death may unintentionally result is even more doubtful."
>
> * * *
>
> "Under those circumstances the conclusion is unavoidable that the infliction of death upon those who had no intent to bring about the death of the victim is not only grossly out of proportion to the severity of the crime but also fails to significantly contribute to acceptable or indeed, any perceptible goals of punishment."

The district court's reliance for a finding of deliberateness in the present case on the substitution of the felony for the element of intent normally required in a prosecution for first degree murder misses the mark. This is clarified by the Supreme Court's recent decision in Enmund v. Florida, __U.S.__, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), which held that, even though the defendant participated in the underlying felony, so that his conviction for first degree murder was proper, the death sentence was disproportionate punishment in his case where he did not actually commit the killings and where he did not intend that they take place. Important to note is Justice White's assessment of the deterrent effect of the death sentence where a death arises as the result of the commission of a felony:

> "It would be very different if the likelihood of a killing in the course of a robbery were so substantial that one should share the blame for the killing if he somehow participated in the felony. But competent observers have concluded that there is no basis in experience for the notion that death so frequently occurs in the course of a felony for which killing is not an essential ingredient that the death penalty should be considered as a justifiable deterrent to the felony itself."

Id., 73 L.Ed.2d at 1153.

Enmund limited itself to actual consideration of the facts before it, where the defendant was a co-felon but not a "trigger-man." But it applied the same reasoning discussed, supra, which Mr. Adams contends mandates the conclusion that death is an appropriate sentence only where it is imposed after a finding that the killing being punished was intentional, a finding which cannot be made on the facts of the instant case.

Also arising from the fact that the instant prosecution was predicated solely upon a theory of felony murder was the use of the underlying felony as an aggravating circumstance. But this aggravation exists automatically in every felony murder case. Moreover, the Florida Supreme Court has interpreted the state statute in such a way that where even a single aggravating factor under the statute survives appeal, a death sentence will not be reversed in the absence of mitigating factors, despite the invalidity of some of the aggravation relied upon by a trial judge in imposing the ultimate penalty. Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977); see, Point IV. infra. Because every felony murder will always have at least one aggravating factor ipso facto, the effect is that death becomes the automatically preferred sentence in a felony murder case.

Certainly all felony murders do not, and constitutionally cannot, mandate the death sentence: a mandatory death sentence would be invalid. E.g., Woodson v. North Carolina, supra. But the application of the aggravating factor of an underlying felony which is implicit in the conviction for first degree felony murder oper-

ates in a similar manner to defeat the function of the statutory aggravating circumstances to confine and channel capital sentencing discretion, in violation of Furman v. Georgia, 408 U.S. 238 (1972). To uphold a death sentence on the basis that it was a felony murder provides no meaningful basis for distinguishing between those felony murderers who receive death and those who obtain life, rendering the Florida statute arbitrary and capricious as applied. Cf., Proffitt v. Florida, 428 U.S. 242, 252 (1976). The North Carolina Supreme Court so found in its decision striking the use of the underlying felony as an aggravating circumstance. State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979).

Further, because every felony murder under the Florida scheme as presently applied comes into the penalty phase with at least one automatic aggravating factor, the burden of proof at that stage of the proceedings shifts to the defendant to establish mitigating evidence to outweigh the presumptive death sentence. Such a result can never be constitutionally permissible, cf., Mullaney v. Wilbur, 421 U.S. 684 (1975), particularly not in a case where the stakes are so high. See, Lockett v. Ohio, supra, 438 U.S. at n. 16 [plurality expressly reserves question as to the constitutionality of Ohio statute, reversed on other grounds, which required death unless defendant proved mitigation].

Finally, Eddings v. Oklahoma, __U.S.__, 102 S.Ct. 869, 71 L. Ed.2d 1 (1982) teaches that even mental factors which do not completely excuse criminal liability must be considered as relevant evidence on the issue of sentence in a capital case. Thus, even though the non-intentional nature of the killing in the instant

case is not a legally sufficient excuse which would result in the total avoidance of culpability for a capital felony because of the felony murder theory of prosecution—although it may well have been a complete defense had the State charged premeditated murder—it is a matter which is properly considered in mitigation of the sentence. But what provides the mitigation in the present case also provides an aggravation: the underlying felony, as a matter of law. Once again, the sentencer is left without substantial guidance on the punishment issue, leading to that standardless and arbitrary sentencing process condemned in Furman v. Georgia, supra.

III. THE AGGRAVATING CIRCUMSTANCES CONSIDERED BY THE JURY AND THE TRIAL JUDGE FAILED TO CHANNEL THEIR SENTENCING DISCRETION AS REQUIRED BY THE EIGHTH AND FOURTEENTH AMENDMENT.

Mr. Adams contends that three of the aggravating circumstances considered by the jury and the trial judge in his case were considered in violation of Eighth and Fourteenth Amendment safeguards. One of the circumstances—that the homicide was "especially heinous, atrocious, or cruel" [Fla.Stat. §921.141(5)(h)]—was improperly considered because it was not supported by the evidence consistently held as necessary to support it. Two other circumstances—that Mr. Adams had a criminal record of "at least five" convictions and that the victim has been a prominent outstanding citizen—were improperly considered because they were non-statutory aggravating circumstances precluded from consideration by the Florida death penalty statute. Because the consideration of these aggravating circumstances in the sentencing